Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KOREAN AIR LINES CO., LTD.,

Petitioner,

—v.—

ERIC W. FORMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEORGE N. TOMPKINS, JR.
ANDREW J. HARAKAS*
TOMPKINS, HARAKAS, ELSASSER & TOMPKINS
Courthouse Square
140 Grand Street
White Plains, New York 10601
(914) 428-2525

Counsel for Petitioner
KOREAN AIR LINES CO., LTD.

* *Counsel of Record*

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QUESTIONS PRESENTED FOR REVIEW

While the appeal was pending in the court below, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996), and held that (a) the types of recoverable compensatory damages in an action to which the Warsaw Convention* applies must be determined by reference to domestic law and (b) the applicable domestic law, DOHSA**, allows for the recovery of pecuniary damages only.

The appeal in the court below arises out of the same event as involved in *Zicherman*. After directing the parties, at the request of Petitioner KAL, to address the effect of *Zicherman* on the pending appeal, the court below declined to decide whether nonpecuniary pre-death pain and suffering damages are recoverable under the Warsaw Convention or DOHSA after *Zicherman*.

The questions presented for review are:

1. Whether the court below was required to apply, to a pending but undecided appeal, the holding, rationale and principle of the intervening decision of the Court in *Zicherman*, so as to preclude an award of nonpecuniary pre-death pain and suffering damages on the basis of the Warsaw Convention alone?

2. Whether, in light of *Zicherman*, the pecuniary damages allowed by DOHSA may be supplemented with nonpecuniary damages for pre-death pain and suffering, on the basis of the Warsaw Convention, general maritime law or state law?

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* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. § 40105.

** Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*

LIST OF ALL PARTIES AND RULE 29.1 LISTING

A. Petitioner

The Petitioner is KOREAN AIR LINES CO., LTD. (hereinafter "KAL") who was the defendant-appellant/cross-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd.
Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

B. Respondent

The Respondent is Eric W. Forman who was the plaintiff-appellee/cross-appellant in the Court of Appeals.

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Petitioner KOREAN AIR LINES CO., LTD. (hereinafter "KAL"), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on May 21, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 84 F.3d 446 (D.C. Cir. 1996) and is reproduced in the Appendix to the Petition at A 1a-9a.[1] The opinions of the district court in *In re Korean Air Lines Disaster of Sept. 1, 1983*, MDL No. 565, Nos. 83-3587 *et al.* (D.D.C. Apr. 8, 1993) and *Forman v. Korean Air Lines*, No. 83-3587 (D.D.C. June 6, 1995), are not officially reported but are reproduced in the Appendix to the Petition at A 52a-55a and A 10a-32a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1996. A 1a. KAL's timely petition for rehearing and suggestion for rehearing *en banc* was denied by Order dated July 5, 1996. A 33a-36a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable statute is the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. § 40105 ("Warsaw Convention"). The pertinent provisions are set forth at A 56a-57a.

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[1] References preceded by "A" refer to pages in the Appendix to the Petition.

STATEMENT OF THE CASE

A. Nature of the Case

Decedent Evelyn Forman was a passenger on KAL flight KE007 who was killed when the flight was shot down by Soviet military aircraft on September 1, 1983. The death of the decedent occurred on the high seas within the meaning of DOHSA, during the course of international transportation by air, within the meaning of the Warsaw Convention.[2] The respondent is Eric Forman, the husband of the decedent and the Administrator of her estate, who sought damages in his individual capacity and on behalf of decedent's estate, parents and siblings.

B. Disposition Below

1. The Rulings of the District Court

The district court denied a pre-trial motion of KAL for a ruling that DOHSA does not permit recovery of any nonpecuniary damages for loss of society, survivors' grief and predeath pain and suffering of the deceased passengers. Specifically, the district court held that nonpecuniary predeath pain and suffering damages are recoverable solely on the basis of Article 17 of the Warsaw Convention[3] as "damage sustained", regardless of the proscriptions of DOHSA. *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83-3587 *et al.*, memo. op. at 2 (D.D.C. Apr. 8, 1993) ("*In re KAL-DDC I*") (A 52a-55a).

At the conclusion of a damages only trial, the jury awarded plaintiff/respondent pecuniary and nonpecuniary damages

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[2] The jurisdiction of the district court was based on federal question (28 U.S.C. § 1331), diversity of citizenship (28 U.S.C. § 1332) and original admiralty and maritime jurisdiction (28 U.S.C. § 1333).

[3] Article 17 of the Convention creates carrier liability for "damage sustained" in the event of the death of a passenger. 49 Stat. 3018 (A 56a).

totaling $1,277,300, which included $290,000 for loss of society, $195,000 for survivor's grief and $120,000 for pre-death pain and suffering. In denying KAL's post-trial motion for judgment as a matter of law, the district court reaffirmed its pre-trial decision permitting recovery of nonpecuniary damages for loss of society and pre-death pain and suffering of the deceased passenger on the basis of the Warsaw Convention. *Forman v. Korean Air Lines*, No. 83-3578, memo. op. at 5-6, 11-14 (D.D.C. June 6, 1995) ("*Forman I*") (A 15a-16a, 19a-21a). The district court, however, set aside the damage awards for survivor's grief as not recoverable as a matter of law. *Id.* at 14-17 (A 21a-24a).[4]

2. The Appeal and the Intervening Supreme Court Decision *in Zicherman v. Korean Air Lines*

KAL appealed the pre-trial and post-trial decisions of the district court. On December 29, 1995, KAL filed its opening brief on appeal and argued that nonpecuniary loss of society damages were not recoverable under DOHSA and the award for nonpecuniary pre-death pain and suffering damages was not supported by sufficient evidence. KAL did not argue in its opening brief on appeal the antecedent question of whether nonpecuniary pre-death pain and suffering damages are recoverable as a matter of law because, unlike loss of society damages, *all* pre-*Zicherman* decisions uniformly allowed the recovery of nonpecuniary pre-death pain and suffering damages on the basis of the Warsaw Convention[5], general maritime law and/or state law.[6]

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[4] The district court also set aside the damage award for loss of financial contributions, as based on speculative expert testimony. This award was reinstated by the Court of Appeals below. A 6a-8a.

[5] *See, e.g., Bowden v. Korean Air Lines*, 814 F. Supp. 592, 598 (E.D. Mich. 1993), *rev'd sub nom. Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir. 1996), *amended on reh'g*, __ F.3d __, 1996 WL 490375 (6th Cir. Aug. 29, 1996); *Saavedra v. Korean Air Lines*, Nos. 84-9324 *et seq.* (C.D. Cal. July 16, 1993), *rev'd in relevant part*, 93 F.3d 547 (9th Cir. 1996); *In re Inflight Explosion on TWA Aircraft Approaching*

(footnote 6 appears on next page)

On January 16, 1996, while the appeal was pending in the court below, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996). The Court in *Zicherman* first rejected the notion that any type of damages are recoverable directly under Article 17 of the Warsaw Convention as "damage sustained." *Zicherman*, 116 S. Ct. at 632-636. The Court explained that "damage sustained" in Article 17 refers to "legally cognizable harm" and that courts are to determine what harm is legally cognizable *only* by reference to the applicable domestic law under the forum's choice-of-law rules. *Id.* In *Zicherman*, as in this case, the applicable domestic law is DOHSA. *Id.* at 635-36.

The Court next rejected the rationale and holding of the Court of Appeals for the Second Circuit (from which the *Zicherman* case emanated) that general maritime/federal common law is the proper domestic law to consider. *Id.* The Court explained that Article 17 of the Convention is merely a "pass-through" provision that does not permit federal courts "to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition" absent the Convention. *Id.* at 636. Thus, federal courts are authorized only "to apply the law that would govern in absence of the Warsaw Convention." *Id.* Since DOHSA applies to deaths on the high seas and permits recovery of pecuniary damages only, the Court ruled that non-

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Athens, Greece on Apr. 2, 1986, 778 F. Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993); *In re Air Crash Disaster Near Honolulu, Hawaii, on Feb. 24, 1989*, 783 F. Supp. 1261, 1264 (N.D. Cal. 1992) ("*Hawaii II*").

[6] *See, e.g., Preston v. Frantz*, 11 F.3d 357, 358 (2d Cir. 1993); *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 378 (5th Cir. 1987); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794, 799 (1st Cir. 1974); *Dugas v. Nat'l Aircraft Corp.*, 438 F.2d 1386, 1389 (3d Cir. 1971); *Gray v. Lockheed*, 880 F. Supp. 1559, 1569 (N.D. Ga. 1995); *Rye v. U.S. Steel Min. Co., Inc.*, 856 F. Supp. 274, 280 (E.D. Va. 1994); *McAleer v. Smith*, 791 F. Supp. 923, 927 (D.R.I. 1992).

pecuniary loss of society damages (the only specific damage award involved in the appeal in *Zicherman*) were unavailable. *Id.* at 636-37; 46 U.S.C. App. § 762 (A 57a). The Court specifically noted that it did not consider "whether § 762 [of DOHSA] contradicts the District Court's allowance of pain and suffering damages," as the question was not before the Court. *Id.* at 636, n.4.

3. The Post-*Zicherman* Supplemental Brief in the Court Below

On January 26, 1996, KAL moved the court below for permission to submit a supplemental brief[7] in the pending appeal to address the recoverability of nonpecuniary pre-death pain and suffering damages as a matter of law, in light of *Zicherman*. Plaintiff opposed the motion, arguing that KAL had waived the argument by not addressing it in KAL's opening brief. The court below, apparently rejecting the waiver argument, granted KAL's motion and expressly directed that KAL address, in its reply brief, the significance of *Zicherman* on the pending appeal. *See* Order (D.C. Cir. Feb. 22, 1996) (A 50a-51a). The court below also directed plaintiff to respond to KAL's arguments in his cross-appeal reply brief. *Id.* The effect of the *Zicherman* decision was fully briefed by the parties in their respective reply briefs.

4. The Decision of the Court Below

On April 12, 1996, the court below heard oral argument of the appeal and on May 21, 1996, rendered its decision. Plaintiff conceded, in light of *Zicherman*, and the court below accepted, that nonpecuniary damages for loss of society and survivor's grief are not recoverable. A 2a-3a. The court below, however, invoking the general rule that an appellate

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[7] In this and all other appeals pending in the court below. *See Maikovich v. Korean Air Lines*, Nos. 94-5371, 94-5382; *Oldham v. Korean Air Lines*, Nos. 94-5321, 94-5338. These appeals had been held in abeyance pending the Court's decision in *Zicherman*. The court below has now ordered that these cases be rebriefed.

court will not entertain an argument raised for the first time in a reply brief ("reply brief waiver rule"), declined to address KAL's argument that the intervening decision in *Zicherman* rendered the legal basis for the district court's decision invalid and that *Zicherman* precluded, as a matter of law, any award of nonpecuniary damages for pre-death pain and suffering. A 4a-5a.

5. The Post-*Zicherman* Decisions of Other Courts

On April 29, 1996, while the appeal was pending in the court below, but before decision, the Court of Appeals for the Sixth Circuit rendered a decision in five KAL disaster passenger cases and held that the intervening *Zicherman* decision presented an "insuperable obstacle" to the recovery of *any* nonpecuniary damages under DOHSA, including pre-death pain and suffering damages. *Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir. 1996) ("*Bickel I*").

On June 4, 1996, the district court below, in four KAL disaster passenger cases awaiting trial, revisited its pre-*Zicherman* ruling that pre-death pain and suffering damages are recoverable (which the court below has now affirmed)[8] and concluded that, in light of *Zicherman*, such damages are not recoverable. *In re Korean Air Lines Disaster of Sept. 1, 1983*, ____ F. Supp. ____, 1996 WL 428519, at *5 (D.D.C. June 4, 1996) ("*In re KAL-DDC II*") (A 45a-46a). On August 15, 1996, the court below granted plaintiffs' petition for interlocutory review of this revised district court decision. *In re Korean Air Lines Disaster of Sept. 1, 1983*, No. 96-8013 (D.C. Cir. Aug. 15, 1996).

On August 2, 1996, the Court of Appeals for the Ninth Circuit rendered a decision in two KAL disaster passenger cases and held that, in light of *Zicherman*, nonpecuniary damages for pre-death pain and suffering are not recoverable under DOHSA or otherwise. *Saavedra v. Korean Air Lines*, 93 F.3d

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[8] *See In re KAL-DDC I*, memo. op. at 2 (A 52a-55a).

547 (9th Cir. 1996). A petition for rehearing and suggestion for rehearing *en banc* was denied on September 9, 1996.

On August 29, 1996, a majority of the panel of the Sixth Circuit Court of Appeals, which had decided *Bickel I*, granted plaintiffs' rehearing petition and, reversing itself, now declined to address the argument that the intervening *Zicherman* decision rendered invalid the legal basis for the district court's[9] award of nonpecuniary pre-death pain and suffering damages. *Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir. 1996), *amended on reh'g*, __ F.3d __, 1996 WL 490375 (6th Cir. Aug. 29, 1996) ("*Bickel II*"). Circuit Judge Batchelder, the author of the unanimous *Bickel I* opinion, dissented. *Bickel II*, 1996 WL 490375, at *6-8 (Batchelder, J. dissenting). KAL's suggestion for rehearing *en banc* of *Bickel II* is pending.

REASONS FOR GRANTING THE PETITION

Since the Court's decision in *Zicherman*, the lower courts have reached differing and conflicting results as to the duty to apply the decision, rationale and principle of *Zicherman* to cases on appeal and awaiting trial and as to the effect of *Zicherman* on the recoverability of nonpecuniary pre-death pain and suffering damages where DOHSA applies.

The court below, after directing KAL and respondent to address the recoverability of nonpecuniary pre-death pain and suffering damages in light of *Zicherman* in their reply briefs (A 50a), then declined to "decide whether pre-death pain and suffering damages may be recovered after *Zicherman*", invoking the reply brief waiver rule. A 5a. The court below thus upheld the district court's award of nonpecuniary pre-death pain and suffering damages solely on the basis of Article 17 of the Warsaw Convention.

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[9] *See Bowden*, 814 F. Supp. at 598 (allowing recovery of pre-death pain and suffering damages on the basis of Article 17).

The Court of Appeals for the Sixth Circuit, in *Bickel I*, allowed the parties to file post-*Zicherman* supplemental briefs to address the effect of *Zicherman* on the recoverability of nonpecuniary pre-death pain and suffering damages. On the basis of the supplemental briefs, a unanimous court in *Bickel I* held that *Zicherman* posed an "insuperable obstacle" to the recovery of such damages. *Bickel I*, 83 F.3d at 132. On rehearing, a majority of the panel (2-1), invoking the reply brief waiver rule, held that it now would decline to decide the issue because *Zicherman* "neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA." *Bickel II*, 1996 WL 490375, at *2. Thus, the panel upheld the award of nonpecuniary pre-death pain and suffering damages solely on the basis of Article 17 of the Warsaw Convention. *Id.*; *see Bowden*, 814 F. Supp. at 598.

The Court of Appeals for the Ninth Circuit, in *Saavedra*, after receiving post-*Zicherman* supplemental briefs, rejected the waiver argument and held that it was "compelled" to apply the intervening decision of the Court in *Zicherman* and that *Zicherman* "effectively forecloses" any claims for nonpecuniary pre-death pain and suffering damages where DOHSA applies. *Saavedra*, 93 F.3d at 550-554.

Subsequent to the decision of the Court of Appeals below, the district court below addressed the effect of *Zicherman* in several other KAL disaster passenger cases still awaiting trial. The district court repudiated its earlier ruling, which formed the basis of the ruling that the Court of Appeals below has affirmed[10], and concluded that, in light of *Zicherman*, nonpecuniary damages for pre-death pain and suffering no longer are available. *In re KAL-DDC II*, 1996 WL 428519, at *5 (A 45a-46a).

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[10] *Forman I*, memo. op. at 5-6 (A 15a-16a); *In re KAL-DDC I*, memo. op. at 2 (A 53a).

Certiorari is appropriate to resolve the conflict created by the post-*Zicherman* decisions in the lower courts and to reaffirm the principle that an intervening decision of the Court interpreting a treaty and a statute is required to be applied by lower courts in all pending cases, particularly those arising out of the same event as involved in the *Zicherman* case. Further, the Court should grant the Petition to clarify the scope of the principles enunciated in *Zicherman* as to the recoverability of nonpecuniary damages under the Warsaw Convention and DOHSA in the remaining cases arising out of this disaster. Certiorari at this time will lead to the orderly and timely conclusion of this litigation and will provide much needed guidance to the lower courts as to the exclusivity of the pecuniary damage standard of DOHSA.

I

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE COURT'S DECISION IN *ZICHERMAN*, DECISIONS OF THE COURT REQUIRING APPLICATION OF ITS DECISIONS RETROACTIVELY TO PENDING CASES AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT

A. The Court Below Has Upheld an Award of Nonpecuniary Damages Even Though the Legal Basis for the Award, Relied Upon by the District Court, Has Expressly and Directly Been Rejected by the Court in *Zicherman*

The interpretation of the Warsaw Convention by the Court in *Zicherman* is clear and direct: the Convention acts as "nothing more than a pass-through, authorizing [the courts] to apply the [damage] law that would govern in absence of the Warsaw Convention." 116 S. Ct. at 636. In rejecting the theory that damages are recoverable directly on the basis of the Convention, the Court in *Zicherman* eliminated the **sole** legal basis upon which the district court in this case had allowed

the recovery of all nonpecuniary damages, including pre-death pain and suffering damages. The decision of the Court of Appeals below, affirming the district court's allowance of nonpecuniary pre-death pain and suffering damages on the basis of the Warsaw Convention, cannot be squared with *Zicherman*. When the holding of the district court, affirmed by the Court of Appeals below, is compared with the holding of the Court in *Zicherman*, the conflict is clear:

District Court Ruling:	***Zicherman Ruling:***
Nonpecuniary pre-death pain and suffering damages are within the meaning of "damage sustained" and, therefore, recoverable directly on the basis of Article 17 of the Warsaw Convention. *Forman I*, memo. op. at 5-6 (A 15a-16a); *In re KAL-DDC I*, memo. op. at 2 (A 53a).	"Damage sustained" in Article 17 means "legally cognizable harm" as defined by the applicable domestic law. Therefore, no damages are recoverable directly on the basis of Article 17 of the Convention. 116 S. Ct. at 632-35, 637.

The court below was required by *Zicherman* to find a domestic law basis for upholding the award of nonpecuniary pre-death pain and suffering damages, because *Zicherman* prohibits the award of *any* damages based solely on the Warsaw Convention. *Zicherman*, 116 S. Ct. at 635-637; *Saavedra*, 93 F.3d at 553-554. *Zicherman obligated* the court below to address the question whether nonpecuniary pre-death pain and suffering damages are recoverable under DOHSA, the applicable domestic law in this case. *See Pescatore v. Pan Am World Airways*, ___ F.3d ___, 1996 WL 507165 (2d Cir. Sept. 9, 1996); *Saavedra*, 93 F.3d at 553-554. In declining to address this question, the court below has erred and has let stand an award of damages based on a legal theory expressly rejected by the Court in *Zicherman*.

B. The Court Below Was Obliged to Apply the Intervening Supreme Court Decision in *Zicherman* to the Pending Appeal

The decision of the court below is in direct conflict with the strict rule that an appellate court has a "duty" to apply retroactively intervening decisions of the Court interpreting a statute or treaty to all cases still open to direct review. *Rivers v. Roadway Express*, 114 S. Ct. 1510, 1519 (1994); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 96 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540-545 (1991). The court below had no authority or discretion to decline to apply the decision, direction and principle of *Zicherman* interpreting the Warsaw Convention and DOHSA to the pending appeal. Once the Court has spoken as to the proper interpretation of a statute or treaty,

> it is the *duty* of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute [or treaty] is an authoritative statement of what the statute [or treaty] meant before as well as after the decision of the case giving rise to that construction.

Rivers, 114 S. Ct. at 1519 (emphasis added). *See Harper*, 509 U.S. at 96 ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announced rule"); *see also Beam*, 501 U.S. at 540-545, 549; *United States v. McKie*, 73 F.3d 1149, 1152-53 (D.C. Cir. 1996).

While this case was open on direct review in the court below, the Court in *Zicherman* rendered a binding judicial construction of the Warsaw Convention and DOHSA. Nevertheless, the court below declined to apply the Court's construction to the availability of nonpecuniary pre-death pain and suffering damages in this case. The court sought to justify its decision declining to "decide whether pre-death pain and

suffering damages may be recovered after *Zicherman*" by invoking the "reply brief waiver rule". A 4a-5a. Invocation of this rule cannot justify the refusal to apply the construction of the Warsaw Convention and DOHSA rendered by the Court while this case was open on direct review. "When this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers*, 114 S. Ct. at 1521, n.12; *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 256 (1970) (Black, J., dissenting). The court below had no authority to disregard the Court's intervening interpretation of the Warsaw Convention and DOHSA when deciding the case pending on appeal. *Id.*

The Sixth Circuit in *Bickel I* and the Ninth Circuit in *Saavedra* properly "determined the effect of the *Zicherman* decision on the district courts' award of nonpecuniary damages" in the cases pending on appeal in those courts. *Saavedra*, 93 F.3d at 550; *Bickel I*, 83 F.3d at 131-32. While the court in *Bickel I* followed the "path laid out" in *Zicherman*, the majority in *Bickel II*, on rehearing, has departed from the clear path of *Zicherman* and has embarked upon the incorrect path charted by the court below. Neither the "reply waiver brief" rule nor any other procedural rule can properly be invoked to thwart the clear direction of the Court in *Zicherman* as to the meaning and effect of the Warsaw Convention and DOHSA.

Certiorari is required to ensure conformity with the holding, direction and principle of the intervening decision of the Court in *Zicherman*.

C. The Decision of the Court Below Is in Direct Conflict With a Decision of the Court of Appeals for the Ninth Circuit

Certiorari also is required to resolve the direct conflict with the decision of the Ninth Circuit properly applying and giving effect to *Zicherman* in pending cases arising out of the

same event as involved in *Zicherman* and in this case. In *Saavedra v. Korean Air Lines*, 93 F.3d 547, 550-554 (9th Cir. 1996), the Court of Appeals for the Ninth Circuit recognized that *Zicherman* "squarely rejected" the view that damages are available directly under the Convention. The court found that the question whether nonpecuniary pre-death pain and suffering damages are recoverable in the KAL disaster passenger cases, therefore, must be determined by reference to domestic law (DOHSA). *Id.* The *Saavedra* court concluded, upon the basis of *Zicherman*, that DOHSA "simply will not brook pain and suffering relief." *Saavedra*, 93 F.3d at 553.

The error of the court below has now been replicated by the Court of Appeals for the Sixth Circuit which, on rehearing (2-1), reversed its prior unanimous decision that nonpecuniary pre-death pain and suffering damages are *not* recoverable in light of *Zicherman*, declined to address the effect of *Zicherman* on the pending appeals and thereby let stand awards of such damages based solely on Article 17 of the Warsaw Convention. *Bickel II*, 1996 WL 490375, at *1-2; *see Stevens v. Department of Treasury*, 500 U.S. 1, 5-8 (1991) (granting certiorari to address clear misreading of applicable and important federal statute).

The plain error of the court below is further compounded by the fact that the district court, whose decision the Court of Appeals below has affirmed, has since concluded, in KAL disaster passenger cases still pending and awaiting trial in the district court, that recovery of nonpecuniary pre-death pain and suffering damages is precluded by *Zicherman*:

> [I]t appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles. . . .

In re KAL-DDC II, 1996 WL 428519, at *5 (A 46a).

Certiorari is required to bring the decision of the court below in line with the decision, direction and principle of the Court in *Zicherman* and to resolve the conflict created with the Ninth Circuit in *Saavedra*.

II

CONSIDERATIONS OF FAIRNESS AND PUBLIC CONFIDENCE IN THE JUDICIAL REVIEW PROCESS MANDATE REVIEW BY THE COURT

Immediately after the Court decided *Zicherman*, KAL sought permission in the court below, in the Sixth Circuit and in the Ninth Circuit, to file a supplemental brief addressing the effect of *Zicherman* on the recoverability of nonpecuniary pre-death pain and suffering damages in the cases still open on direct review. Each court granted KAL's request, over the objections of the plaintiffs based on waiver, and each court directed the parties to address the effect of *Zicherman* on the recoverability of nonpecuniary pre-death pain and suffering damages in the pending appeals.

However, each court came to a different conclusion. The Ninth Circuit addressed and decided the question, the court below declined to decide the question, and the Sixth Circuit first decided the question but then, on rehearing, decided not to decide the question.

In view of these conflicting results, in cases all arising from the same event and all purporting to apply the same law, the preservation of the integrity of the judicial process mandates review by the Court of the decision of the court below.

A. The Court Below Improperly Applied the "Reply Brief Waiver Rule"

The court below initially recognized its duty to address the effect of the intervening decision of *Zicherman* on the recoverability of nonpecuniary pre-death pain and suffering dam-

ages when the court granted KAL's post-*Zicherman* request to file a supplemental brief and *expressly* directed KAL and respondent to address the significance of *Zicherman* in their respective reply briefs. *See* Order dated Feb. 22, 1996 (A 50a-51a). However, the court below then declined to decide the effect of *Zicherman* by invoking the "reply brief waiver rule" and, as a result, left standing an award of damages on a basis clearly proscribed by the Court in *Zicherman*. This is manifestly unjust.

"Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). Like any general rule of procedure, waiver should not be applied where its underlying justifications are absent. *See Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *Hormel*, 312 U.S. at 557-58; *Federal Savings & Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 377, n.3 (11th Cir. 1987); *United Transp. Union v. Dole*, 797 F.2d 823, 827-28 (10th Cir. 1986).

Application of the "reply brief waiver rule" in this case does not advance or serve any purpose of the rule.[11] In no sense could respondent argue, nor did he argue, that he was ambushed or unable to respond to KAL's arguments. Respondent advanced all arguments relevant to the issue before decision. The court below had the benefit of the opposing views of the respondent. The reply briefs did not consist of mere assertions, with no discussion of case law or legislative history supporting the respective views of the parties. *See Carducci v. Reagan*, 714 F.2d 171, 176 (D.C. Cir. 1983). KAL's reply brief argument alone consisted of a 12 page discussion of the relevant case law and statutes.

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[11] The purpose of the "reply brief waiver rule" is to prevent: (1) unfairness to an appellee who is unable to respond to an argument raised for the first time in a reply brief, and (2) an ill-advised opinion on the legal issue raised, because the Court has not had the benefit of an opposing view. *Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992).

"Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel*, 312 U.S. at 557. The result of the decision of the court below is to let stand an erroneous decision of the district court, based on a legal analysis rejected by the intervening decision of the Court in *Zicherman*. Even the district court has since rejected its prior legal analysis, in other pending cases, on the basis of *Zicherman*. *See In re KAL-DDC II*, 1996 WL 428519, at *5 (A 45a-46a). "Thus viewed, this is exactly the type of case where application of the general practice would defeat rather than promote the ends of justice. . . ." *Hormel*, 312 U.S. at 560; *Bickel II*, 1996 WL 490375, at *6-8 (Batchelder, J. dissenting).

As Circuit Judge Batchelder stated, in dissenting from the majority decision on rehearing in *Bickel II*:

> [T]he majority rests its judgment not even on the shifting sands of its understandable desire to do equity in these cases. Rather, the majority constructs this judgment "upstairs above a vacant lot."

Bickel II, 1996 WL 490375, at *8 (Batchelder, J. dissenting).

B. The Refusal of the Court Below to Apply the Intervening Decision of the Court in *Zicherman* Calls for an Exercise of the Court's Supervisory Power

The post-*Zicherman* argument advanced by KAL involved an important matter of treaty and statutory interpretation, subject to *de novo* review in the pending appeal. After *Zicherman*, the decision of the district court was patently incorrect and based on an improper interpretation of the Warsaw Convention and DOHSA. The court below was required to review and correct the district court's misinterpretation of the Convention and DOHSA, in light of *Zicherman*, as a matter of the proper administration of federal law. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991); *Dole*, 797 F.2d at 828.

Moreover, principles of fairness required the application of *Zicherman* to the pending appeal to decide whether nonpecuniary pre-death pain and suffering damages are recoverable in the pending case arising out of the same event as involved in *Zicherman*. The result of the decision of the court below, refusing to even consider the effect of *Zicherman*, is that respondent has recovered a windfall award and KAL must pay millions of dollars in nonpecuniary damages[12] which are insupportable as a matter of law. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486, n.16 (1981); *Bickel II*, 1996 WL 490375, at *8 (Batchelder, J., dissenting). If *Zicherman* had been decided before briefing in the court below, the argument would have been addressed by KAL in the opening brief. The court below now penalizes KAL for advancing an argument not only made viable, but required, by the intervening *Zicherman* decision.

There now have been three post-*Zicherman* Circuit Court decisions in cases arising out of the KAL disaster, resulting in three different conclusions as to the effect and meaning of the intervening decision of the Court in *Zicherman* on the pending appeals. Considerations of fairness, judicial integrity, and the public's perception of judicial proceedings, require review by the Court of the decision of the court below. *See United States v. Atkinson*, 297 U.S. 157, 160 (1936).

III

THE COURT BELOW HAS DECLINED TO ADDRESS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED

The argument that nonpecuniary pre-death pain and suffering damages are not recoverable in light of *Zicherman* was

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[12] The 16 awards for pre-death pain and suffering damages in the pending cases arising out of the KAL disaster range from $0 to $1.35 million and total $5,165,000, excluding prejudgment interest.

antecedent to and ultimately dispositive of whether the award in this case was supported by sufficient evidence. While the court below declined to address this antecedent legal argument, in light of the intervening decision of the Court in *Zicherman*, the Court has the authority to do so at this time. *See Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, 965-66 (1995); *U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 445-47 (1993); *United States v. Williams*, 504 U.S. 36, 40-46 (1992); *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990).

The question of the preclusive effect of *Zicherman* and DOHSA on the recoverability of nonpecuniary pre-death pain and suffering damages involves an important question of federal law, present in each of the pending KAL disaster cases[13], and arises in almost every death case occurring on the high seas, in both an aviation and non-aviation context. Certiorari should be granted in this case so that the Court may resolve the conflict that has now developed and to provide an early and definitive guide for the lower courts to avoid further inconsistent results in this and other litigation involving DOHSA.

Before *Zicherman*, *all* lower courts allowed § 762 of DOHSA to be supplemented with nonpecuniary pre-death pain and suffering damages under either the Convention, state law or general maritime law or a combination thereof. *See supra* notes 5 & 6; A 57a. In the only pre-*Zicherman* case to preclude an award of nonpecuniary pre-death pain and suffering damages in a Warsaw Convention case involving DOHSA, the district court held that such damages nevertheless were recoverable on the basis of the Convention alone. *Hawaii II*, 783 F. Supp. at 1264-65; *In re Air Disaster Near Honolulu, Hawaii, on Feb. 24, 1989*, 792 F. Supp. 1541, 1546 (N.D. Cal. 1990). This was the same legal theory relied upon by the district court below in allowing the award in this case.

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[13] Twenty-five (25) cases are pending on appeal or awaiting trial in the district courts.

This theory has now been rejected and rendered invalid by the Court in *Zicherman*.

Although the recoverability of loss of society damages was the only issue directly addressed in *Zicherman*, the post-*Zicherman* courts that have addressed the recoverability of pre-death pain and suffering damages, in light of the intervening *Zicherman* decision, have concluded that the reasoning of *Zicherman* forecloses recovery of any nonpecuniary damages under DOHSA, including pre-death pain and suffering damages. *Zicherman* made what was once a nonviable argument, viable and controlling.

It is significant that the two Circuit Courts of Appeals that have directly addressed the effect of *Zicherman* have concluded that such damages are not recoverable, despite earlier contrary holdings of the First, Second, Third and Fifth Circuits and numerous district courts. *See supra* note 6. The Sixth Circuit originally stated in *Bickel I*:

> Despite the fact that the *Zicherman* Court was not asked to address the propriety of allowing a pain and suffering award, we think the principle of *Zicherman* constitutes an *insuperable obstacle* to an award of pain and suffering damages—clearly non-pecuniary damages—in these cases.

Bickel I, 83 F.3d at 132 (emphasis added). The majority in *Bickel II*, reversing itself on rehearing, offered no explanation as to how *Zicherman* could pose an "insuperable obstacle" in April, but that in August *Zicherman* "neither added to, nor made any changes in the law regarding the availability of nonpecuniary damages under DOHSA." *Bickel II*, 1996 WL 490375, at *2.

Similarly, the Ninth Circuit in *Saavedra v. Korean Air Lines*, held

> that the Supreme Court's reasoning in *Zicherman*, although directly dealing only with a claim for loss of

> society, effectively forecloses any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors, and the pre-death pain and suffering of the victims.

93 F.3d at 550-551; *see In re KAL-DDC II*, 1996 WL 428519, at *5 (A 45a-46a).

As succinctly explained by the dissent in *Bickel II*, *Zicherman* "made it crystal clear that where DOHSA governs, it governs exclusively":

> *Zicherman*, it is true, does not directly address the propriety of pre-death pain and suffering damages. But the only plausible reading of that case is that such damages, because they are not pecuniary damages, are not recoverable. *See Saavedra*, 1996 WL 431734, at *6.

Bickel II, 1996 WL 490375, at *7-8 (Batchelder, J. dissenting).

Pending in the court below are three further appeals, which were fully briefed prior to *Zicherman*, but held in abeyance awaiting the decision in *Zicherman*. The court below now has ordered that those appeals be rebriefed, apparently in light of *Zicherman*. Also pending in the court below is an interlocutory appeal from the district court's post-*Zicherman* decision rejecting its prior decision allowing the recovery of nonpecuniary pre-death pain and suffering damages on the basis of the Convention alone. *In re Korean Air Lines Disaster of Sept. 1, 1983*, No. 96-8013 (D.C. Cir. Aug. 15, 1996) (granting interlocutory review).

In addition to the appeals pending in the court below, there are three KAL disaster cases awaiting trial in the Eastern District of New York, where the district court has held, post-*Zicherman*, that nonpecuniary pre-death pain and suffering damages are recoverable under DOHSA and two cases are pending in the Southern District of New York. *Beirn et al. v. Korean Air Lines*, Nos. 83-4624, 83-4626 (E.D.N.Y. Aug. 28,

1996) (Platt, J.). Finally, there are four KAL disaster cases awaiting trial in the Central District of California where the district courts, pursuant to *Zicherman* and *Saavedra*, have dismissed all claims for nonpecuniary pre-death pain and suffering damages.

The Court should grant certiorari to resolve the inconsistent and conflicting rulings present, not only in the KAL disaster litigation, but also the conflict which now exists between the Ninth Circuit and the decisions of the First, Second, Third and Fifth Circuits (*see supra* note 6) as to the recoverability of nonpecuniary pre-death pain and suffering damages under DOHSA.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted in all respects.

Dated: October 3, 1996

Respectfully submitted,

George N. Tompkins, Jr.
Andrew J. Harakas*
TOMPKINS, HARAKAS,
ELSASSER & TOMPKINS
Courthouse Square
140 Grand Street
White Plains, New York 10601
(914) 428-2525

Attorneys for Petitioner
KOREAN AIR LINES CO., LTD.

* *Counsel of Record*

Of Counsel:
JOSEPH F. BERRAFATI

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 12, 1996 Decided May 21, 1996

No. 95-5230

ERIC W. FORMAN,
APPELLEE/CROSS-APPELLANT

v.

KOREAN AIR LINES CO., LTD.,
APPELLANT/CROSS-APPELLEE

Consolidated with
95-5231

Appeals from the United States District Court
for the District of Columbia
(83cv3587)

Andrew J. Harakas argued the cause and filed the briefs for appellant/cross-appellee Korean Air Lines Co., Ltd. *George N. Tompkins, Jr.* entered an appearance.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Juanita M. Madole argued the cause and filed the briefs for appellee/cross-appellant Eric W. Forman. *George E. Farrell* entered an appearance.

Before: SILBERMAN, WILLIAMS, and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: Korean Air Lines and Eric Forman both appeal aspects of the judgment entered by the district court after trial on damages arising out of the downing of KAL Flight KE007. We reject KAL's claims that the evidence did not support the jury's award for Evelyn Forman's pre-death pain and suffering and that the district court erred in awarding prejudgment interest at the prime rate. Forman concedes that the Supreme Court's decision in *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996), precludes the recovery of loss of society damages in a case brought under the Warsaw Convention, so we reverse the judgment below as to those damages. And, we reverse the district court's determination that Forman offered insufficient evidence as to Evelyn's future earnings and contributions to him, and remand with instructions to reinstate the jury's verdict as to those damages.

I.

Evelyn Forman was returning home to the Philippines, from where she had moved to New York seven years earlier, on KAL Flight 007, which was shot down by a Soviet fighter plane. All 269 persons on board were killed. Evelyn's husband, Eric, sued Korean Air Lines seeking damages for Evelyn's pre-death pain and suffering, for his own loss of her financial contributions and household services, and for the grief, mental anguish, and loss of society he suffered along with other members of Evelyn's family. The case was consolidated with all of the other federal cases arising out of the disaster for a single trial on liability in the United States District Court for the District of Columbia. A jury found against Korean Air Lines determining that the shoot-down resulted from KAL's "willful misconduct" so the Warsaw

Convention's limitations on carrier liability were inapplicable. *See In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1478–79 (D.C. Cir.), *cert. denied sub nom. Dooley v. Korean Air Lines*, 502 U.S. 994 (1991).

At the subsequent damages trial in this case, both sides presented evidence as to whether passengers survived the initial impact of the missile attack and were, thus, subject to pain and suffering before the plane crashed into the Sea of Japan. Forman offered evidence of the grief suffered by Evelyn's survivors, and also put on expert testimony estimating the amount of future financial contributions he lost due to his wife's death. The jury awarded Eric Forman and Evelyn's other family members damages under each theory put forward at trial for a total of $1,277,300. Prejudgment interest, calculated at the prime rate, increased the judgment to $2,151,050. In response to post-trial motions by Korean Air Lines, the district court entered judgment as a matter of law striking the jury awards for grief and mental anguish (as nonrecoverable under the Warsaw Convention) and loss of Evelyn's financial contributions (as resting on insufficient evidence). The district court rejected KAL's challenges to the awards for pre-death pain and suffering and for Evelyn's family's loss of society. Both parties appeal portions of the district court's decision.

II.

Loss of Society/Mental Grief

KAL appeals the district court's entry of judgment granting Evelyn Forman's survivors $290,000 for "loss of care, comfort, society, companionship, love and affection." Forman concedes that recovery of those damages is foreclosed by the Supreme Court's recent decision in *Zicherman*, which held that the limitation on recovery to pecuniary damages in the Death on the High Seas Act, 46 U.S.C.App. §§ 761–768 (1975) (DOHSA), obtained in a Warsaw Convention case arising out of an air crash on the high seas. Accordingly, we reverse the district court's entry of judgment on this claim. Forman did not challenge the district court's reversal of the jury's award

of $195,000 for the mental anguish and grief of Evelyn's survivors until his reply brief. Forman asserted then that his first reading of *Zicherman*—decided some 10 days before his initial brief was due—had indicated that these damages, like loss of society damages, were no longer available under the Warsaw Convention. Further study, however, changed his mind. Ordinarily, we will not entertain arguments or claims raised for the first time in a reply brief. *See, e.g., LaRouche v. FEC*, 28 F.3d 137, 140 (D.C. Cir. 1994); *McBride v. Merrell Dow Pharmaceuticals, Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) ("Considering an argument advanced for the first time in a reply brief ... is not only unfair to an appellee but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered.") (citations omitted). That Forman had 10 days to read the *Zicherman* opinion before he filed his opening brief hardly creates an exceptional circumstance allowing him to raise a new ground for appeal in his reply brief. We will thus not disturb the district court's ruling that damages for the survivors' mental grief are not recoverable.

Pre-death Pain and Suffering

The jury awarded the estate of Evelyn Forman $120,000 for pain and suffering she endured between the time the missile struck the airplane and the time the airplane crashed. Korean Air Lines contends that Forman failed to proffer sufficient evidence to support this award and also that these non-pecuniary damages, as it explains for the first time in its reply brief, are barred by the DOHSA as interpreted in *Zicherman*. Korean Air Lines argues that it should be permitted to raise this argument because the briefing schedule (Forman brought a cross-appeal) permitted Forman in his reply brief to respond to KAL's reply brief argument. Nevertheless, since the exchange took place in reply briefs, we were denied the opportunity to receive the full briefing that the ticklish question KAL raises deserves. And that *Zicherman* was decided after KAL filed its opening brief does not justify its tardiness. The argument that pre-death pain and suffering damages are not available if DOHSA applies has

been raised numerous times before *Zicherman*. *Compare, e.g., Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984) (survival action permissible in DOHSA action), *with In re Air Crash Disaster Near Honolulu, Hawaii*, 792 F. Supp. 1541, 1545–46 (N.D. Cal. 1990) (DOHSA preempts survival action). *Zicherman* itself could not have surprised KAL: the counsel who argued this case before us argued *Zicherman* before the Supreme Court. Accordingly, we do not, as the Sixth Circuit recently has, *Bickel v. Korean Air Lines*, No. 93–2144, slip op. at 17–18 (6th Cir. Apr. 29, 1996), decide whether pre-death pain and suffering damages may not be recovered after *Zicherman*.

As to the sufficiency of the evidence that Evelyn Forman survived the initial impact of the missile strike and was conscious for some or all of the time it took the plane to descend into the Sea of Japan, we agree with the Second Circuit, which has twice upheld awards for claims from the same incident. *See Hollie v. Korean Air Lines*, 60 F.3d 90, 92–93 (2d Cir. 1995), *judgment vacated on other grounds and case remanded*, 116 S. Ct. 808 (1996); *Zicherman v. Korean Air Lines*, 43 F.3d 18, 23 (2d Cir. 1994), *rev'd in part on other grounds*, 116 S. Ct. 629 (1996).

The key factual dispute turns on whether the passengers were immediately rendered unconscious. Forman offered evidence that some occupants of the plane—the flight crew—survived the missile impact for at least 104 seconds. The flight data recorder continued to function for that amount of time and it captured the flight crew's post-impact actions and utterances. Forman's experts testified that the passengers could have remained conscious during the decompression that followed the puncturing of the fuselage, and that they would have had sufficient time to don their oxygen masks, which, in any event, would have been less and less necessary as the plane descended.[1] The experts testified that the descent

[1] Forman's airplane expert testified that the holes in the fuselage would have caused the cabin's atmosphere, which was initially equivalent to an altitude of 4,800 feet, rapidly to approach the ambient altitude of between 35,000 and 38,000 feet. Since the

would have taken between nine and twelve minutes and that the passengers would have suffered physical pain due to the decompression. And, according to stipulation of the parties, Evelyn's seat was a full 32 rows from the tail of the plane where the shrapnel appears to have hit. This body of evidence permits the inference that Evelyn Forman survived the missile impact, remained conscious despite the airplane's decompression, and experienced decompression-related pain.

KAL's evidence to the contrary was impressive. Its experts asserted that the plane disintegrated after 104 seconds and that, in any event, the airplane's cabin would have almost immediately equalized with the rarified ambient atmosphere, rendering all passengers unconscious—and thus anesthetized to pain—in a matter of seconds. We do not think, however, that the trial left the jury with but one conclusion to draw, *Parker v. District of Columbia*, 850 F.2d 708, 711 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), nor do we think that the pain and suffering award could only have resulted from jury speculation.

Loss of Financial Contributions

Although the jury awarded Forman a total of $392,300 for the loss of financial contributions from his wife, the district court granted judgment in favor of KAL. Forman relied on an expert who calculated Evelyn Forman's future earnings ($19,804 in 1983) based on the average earnings of a college-educated female of her age. The district judge thought that testimony was "speculation and conjecture" because Evelyn Forman's actual earnings in the United States never exceeded the $5,253 she made in 1983. The district court was also troubled by the lack of evidence as to what portion of Evelyn's future earnings would benefit Eric.

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airplane's ventilation system was continuously forcing air into the cabin, the expert stated that the interior atmosphere would not have equalized with the ambient altitude, but would have reached only the equivalent of roughly 22,000 feet. Forman's physiologist testified that at that altitude, the passengers would have been conscious for five to ten minutes even without the oxygen masks.

This is a close issue. The district judge would have been on firm ground but for the undisputed testimony of her husband that Evelyn had only recently received a green card and that prior to that point she had been inhibited from seeking a high-paying job. To be sure, she did not earn a great deal even in the months between getting her green card and taking the ill-fated flight. But her husband testified that she had not actively sought other employment then, knowing that she was soon to travel back to the Phillippines for a two-week visit. Although it may seem farfetched, the jury could have credited that testimony. We note that the tax returns indicating Evelyn's prior, meager earnings were presented to the jury and used by KAL in cross-examining plaintiff's expert and in assailing his conclusions during closing argument. The jury was thus presented with, and legitimately—if barely legitimately—rejected, evidence suggesting that plaintiff's expert's estimates were unreasonable.[2]

Since the expert concluded, and the jury reasonably could have agreed, that Evelyn's earnings history was of limited predictive value, this case is akin to those in which courts have allowed loss of future earnings damages for decedents with little or no earnings history. *See, e.g., Reilly v. United States*, 863 F.2d 149, 166–167 (1st Cir. 1988); *see also In re Air Crash near Cerritos, California*, 982 F.2d 1271, 1278–79 (9th Cir. 1992); *Caron v. United States*, 548 F.2d 366, 370 (1st Cir. 1976). Nor do we think that *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567–70 (D.C. Cir. 1993), on which the district court and Korean Air Lines rely, requires a different result. In *Joy*, we reversed a jury verdict based on

[2] That does not mean that we will never disturb a judgment based on expert testimony. *See Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 569 (D.C. Cir. 1993) ("[I]n view of the patent flaws in [plaintiff's expert's] testimony, we must resist the temptation to answer objections to receipt of expert testimony with the shorthand remark that the jury will give it 'the weight it deserves.' ") (quotations omitted). Where the conclusions have an adequate foundation in fact, concerns we might have as to their probative value are somewhat allayed where evidence giving rise to these concerns enters the jury's ken.

expert testimony painting an improbably rosy picture of the decedent's future earning capacity based on assumptions about decedent's possible career moves that were "wholly speculative" in light of his work history. Since Evelyn's pre-green card work history could be legitimately disregarded in predicting her future earnings, we think that Forman's expert's reliance on data concerning the average woman of Evelyn's age and education was permissible.[3]

Finally, we are satisfied that sufficient evidence supported the proposition that the Formans' was a share-and-share-alike household such that the jury could reasonably find that whatever portion of Evelyn's earnings remained after taxes and after her personal consumption would redound to Eric's benefit.

Prejudgment Interest

Korean Air Lines objects to the district court's award of prejudgment interest at the prime rate for each year between the accident and the entry of judgment. KAL contends that the purpose of prejudgment interest is to compensate—but not overcompensate—the plaintiff. Since the prime rate—the rate charged by banks on short-term, unsecured loans to their most creditworthy customers—not only consists of the financial community's guess as to future inflation rates, but also includes a profit component and an allowance for the risk of default, it is argued to be too high, resulting in a windfall for Forman. KAL prefers the 52-week Treasury Bill rate, which is said to represent the financial community's guess as to the appropriate return on a risk-free loan.

KAL concedes that the decision on how to compute prejudgment interest is discretionary with the district court. We quite agree with many of our sister circuits that the use of the prime rate for determining prejudgment interest is well within the district court's discretion. *See, e.g., Cement Divi-*

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[3] Indeed, the use, where appropriate, of statistics based on averages derived from large samples may limit jury speculation more than imaginative prognostication founded on "facts" specific to a decedent.

sion, Nat'l Gypsum Co. v. City of Milwaukee, 31 F.3d 581, 587 (7th Cir. 1994), *aff'd*, 115 S. Ct. 209 (1995); *Mentor Ins. Co. v. Brannkasse*, 996 F.2d 506, 520 (2d Cir. 1993); *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 939 F.2d 1540, 1545 (Fed. Cir. 1991); *Alberti v. Klevenhagen*, 896 F.2d 927, 938, *vacated in part*, 903 F.2d 352 (5th Cir. 1990) (holding a district court's *failure* to use the prime rate to be in error). Indeed, we think the Seventh Circuit is correct—that the prime rate is not merely *as* appropriate as the Treasury Bill rate, but *more* appropriate:

> Interest at what rate? Surely the market rate. That is what the victim must pay—either explicitly if it borrows money or implicitly if it finances things out of cash on hand—and the rate the wrongdoer has available to it.... [A] court should use the 'prime rate'—that is, the rate banks charge for short-term unsecured loans to creditworthy customers. This rate may miss the mark for any particular party, but it is a market-based estimate.

In the Matter of Oil Spill by the Amoco Cadiz off the Coast of France, 954 F.2d 1279, 1332 (7th Cir. 1992).

* * *

Accordingly, we affirm the entry of judgment for decedent's pre-death pain and suffering, and we affirm the district court's calculation of prejudgment interest at the prime rate. We reverse the judgment of the district court awarding damages for loss of society, and striking the award for loss of financial contributions as too speculative and remand for entry of the appropriate orders.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Civil Action No. 83-3587 (AER)
Filed: June 6, 1995

ERIC W. FORMAN, Individually and as Personal Representative of the Estate of EVELYN S. FORMAN, Deceased,

Plaintiff,

—v.—

KOREAN AIR LINES, CO., LTD.,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion of Defendant Korean Air Lines Co., Ltd. ("KAL") for Judgment as a Matter of Law, pursuant to Fed. R. Civ. P. 50, Plaintiff's Opposition thereto, KAL's Reply, and Plaintiff's Sur-Reply.

I. Background

Plaintiff Eric W. Forman, in his individual capacity and as personal representative of the estate of his deceased wife, Evelyn S. Forman, and on behalf of the decedent's parents (Anselmo and Leticia Sinjian) and siblings (Edna Sinjian, Marisa Sinjian, Babylon Marie Estrada and Henry Sinjian)

(collectively referred to as "the Beneficiaries"), sought wrongful death and survival damages from KAL for the death of Evelyn Forman, a passenger on KAL Flight 007, which was shot down by Soviet military aircraft on September 1, 1983 over the Sea of Japan. After a consolidated trial before this Court, on August 2, 1989, a jury found KAL liable for the shootdown of Flight 007 and guilty of wilful misconduct. KAL's liability was affirmed on appeal. *In Re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

In a damage trial held on Plaintiff's claims,[1] which were brought under the Warsaw Convention[2] and the Death on the High Seas Act ("DOHSA"),[3] a jury awarded the following damages:

1. to the estate of Evelyn Forman:
   a. $120,000.00 for conscious mental and physical pain, suffering and fear of impending death;
2. to Eric Forman:
   a. $92,00.00 for loss of financial contributions from Sept. 1, 1983 to date of trial;
   b. $300,000.00 for loss of future financial contributions;
   c. $80,000.00 for loss of services from Sept. 1, 1983 to date of trial;

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[1] At the close of Plaintiff's evidence during the damage trial, KAL moved for a directed verdict in its favor pursuant to Fed. R. Civ. P. 50(a) as to the following: the loss of financial contributions claim of Eric Forman; the loss of society claims of Eric Forman and of the Beneficiaries; the mental anguish, grief and sorrow claims of Eric Forman and of the Beneficiaries; and the claim of Evelyn Forman's estate for conscious mental and physical pain, suffering and fear of impending death. KAL renewed its motion at the close of its case. This Court denied KAL's motion.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, entered into force for the United States on October 29, 1934, 49 Stat. 3000; T.S. No. 876, *reprinted in* 49 U.S.C. App. § 1502 (1988).

[3] 46 U.S.C. App. § 761 (1988).

d. $200,000.00 for loss of services in the future;
e. $80,000.00 for loss of care, comfort, society, companionship, love and affection from Sept. 1, 1983 to date of trial;
f. $40,000.00 for loss of care, comfort, society, companionship, love and affection in the future;
g. $40,000.00 for mental anguish, grief and sorrow, accompanied by physical manifestations from Sept. 1, 1983 to date of trial; and
h. $15,000.00 for mental anguish, grief and sorrow, accompanied by physical manifestations in the future.

3. to Anselmo Sinjian:
   a. $30,000.00 for loss of care, comfort, society, companionship, love and affection from Sept. 1, 1983 to date of trial;
   b. $10,000.00 for loss of care, comfort, society, companionship, love and affection in the future;
   c. $15,000.00 for mental anguish, grief and sorrow, accompanied by physical manifestations from Sept. 1, 1983 to date of trial; and
   d. $15,000.00 for mental anguish, grief and sorrow, accompanied by physical manifestations in the future.

4. to Leticia Sinjian:
   a. $20,000.00 for companionship, loss of care, comfort, society, love and affection from Sept. 1, 1983 to date of trial;
   b. $20,000.00 for loss of care, comfort, society, companionship, love and affection in the future;
   c. $30,000.00 for mental anguish, grief and sorrow, accompanied by physical manifestations from Sept. 1, 1983 to date of trial; and

d. $30,000.00 for mental anguish, grief and sorrow, accompanied by physical manifestations in the future.

5. to Edna Sinjian:
   a. $20,000.00 for loss of care, comfort, society, companionship, love and affection from Sept. 1, 1983 to date of trial;
   b. $10,000.00 for loss of care, comfort, society, companionship, love and affection in the future; and
   c. $20,000.00 for mental anguish, grief and sorrow, accompanied by physical manifestations from Sept. 1, 1983 to date of trial.

6. to Marisa Sinjian:
   a. $10,000.00 for loss of care, comfort, society, companionship, love and affection from Sept. 1, 1983 to date of trial;
   b. $10,000.00 for loss of care, comfort, society, companionship, love and affection in the future; and
   c. $10,000.00 for mental anguish, grief and sorrow, accompanied by physical manifestations from Sept. 1, 1983 to date of trial.

7. to Babylon Marie Estrada:
   a. $10,000.00 for loss of care, comfort, society, companionship, love and affection from Sept. 1, 1983 to date of trial;
   b. $10,000.00 for loss of care, comfort, society, companionship, love and affection in the future; and
   c. $10,000.00 for mental anguish, grief and sorrow, accompanied by physical manifestations from Sept. 1, 1983 to date of trial.

8. to Henry Sinjian:
   a. $10,000.00 for loss of care, comfort, society, companionship, love and affection from Sept. 1, 1983 to date of trial;

b. $10,000.00 for loss of care, comfort, society, companionship, love and affection in the future; and
c. $10,000.00 for mental anguish, grief and sorrow, accompanied by physical manifestations from Sept. 1, 1983 to date of trial.

Judgment on the jury verdict was entered on December 7, 1994.

II. Summary of the Issues

KAL now moves this Court for judgment as a matter of law on several grounds. KAL contends that the jury award to Evelyn Forman's estate for conscious mental and physical pain, suffering and fear of impending death was not supported by the evidence. KAL also argues that the Court erred as a matter of law in allowing recovery for loss of society and for mental anguish, because such damages are not permitted under DOHSA, which KAL contends exclusively governs the types of damages recoverable for wrongful deaths occurring on the high seas. Alternatively, KAL argues that even if loss of society damages are permitted, such damages may be recovered only by the decedent's financially dependent relatives. KAL also asserts that even if mental anguish damages are permitted, the awards for mental anguish were not supported by the evidence and were excessive. KAL further claims that the jury awards to Eric Forman for loss of financial contributions and for loss of services were not supported by the evidence and were excessive.

Plaintiff counters that all of the damages awarded to the claimants are permissible under the Warsaw Convention, which Plaintiff argues, takes precedence over DOHSA. Plaintiff further contends that the evidence supported the damages awarded.

III. Analysis

A. *The Estate's Claim for Evelyn Forman's Conscious Mental and Physical Pain, Suffering and Fear of Impending Death*

As this Court has said previously on numerous occasions, its jurisdiction over this litigation is based on both the Warsaw Convention and DOHSA. An English translation of Article 17 of the Warsaw Convention, which was written in French, provides that:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 U.S.C. App. § 1502 note, Article 17. Although Article 17 of the Warsaw Convention does not specify the types of damages recoverable, it does permit recovery for "damage sustained." This Circuit has held that "damage sustained" refers to damages, which are compensatory in nature, for "actual harm experienced." *In Re Korean Air Lines Disaster*, 932 F.2d at 1485.

DOHSA limits wrongful death recovery to the pecuniary loss of the decedent's beneficiaries and does not permit what is commonly known as a "survival action," in which the estate recovers nonpecuniary damages for the pain and suffering endured by a decedent prior to death. 46 U.S.C. §§ 761-762; *see Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623-25 (1978). In contrast, Article 17 of the Warsaw Convention has been interpreted to permit recovery through both wrongful death actions and survival actions. *See In Re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 415 (9th Cir. 1983); *In Re Air Crash Disaster Near Honolulu, Hawaii on Feb. 24, 1989*, 783 F. Supp. 1261, 1265 (N.D.Cal. 1992). Since survival claims may be brought under the Warsaw Convention, recovery for a decedent's pre-death pain, suffering and fear of

impending death is permissible, provided that such recovery is supported by the evidence.

KAL contends that the jury award of $120,000.00 to the estate of Evelyn Forman for pre-death pain, suffering and fear of impending death must be stricken because Plaintiff failed to establish at trial that the decedent survived the Soviet missile strike, was conscious after the missile strike, was aware of the impending danger, and endured physical pain prior to the plane's crash into the Sea of Japan. Both Plaintiff and KAL presented expert witnesses who, relying on various information compiled during the investigation of the crash of Flight 007, reached certain conclusions about what happened to the plane and its passengers after the missile strike.

At trial, Plaintiff produced two expert witnesses, Captain James McIntyre and Commander Robert Elzy. Captain McIntyre, who was accepted by the Court as an expert on the pressurization, hydraulics and flight control systems and operational procedures of 747 airplanes, and as an expert in aviation safety and accident investigation, testified as to the likely chain of events that occurred after Flight 007, a 747 aircraft, was struck by the Soviet missile. Captain McIntyre opined that while Flight 007 was at a cruising altitude of 35,000 feet, one or two Soviet missiles hit the plane and punctured its tail section. *See Forman v. Korean Air Lines Co., Ltd.*, No. 83-3587, Transcript of Trial ("*FTT*"), Vol. 45 (Dec. 7, 1993) at 93-95, 102, 120.[4] Captain McIntyre stated that when the cabin altitude reached 10,000 feet, a warning alarm in the cockpit alerted the crew to a problem with the cabin altitude. *FTT*, Vol. 45 (Dec. 7, 1993) at 120-22. Captain McIntyre explained that about twenty-eight (28) seconds after the missile strike, the public address chime was heard, from which he inferred that the passengers' oxygen masks had dropped from their compartments and that a recorded public announcement had directed the passengers, in several lan-

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[4] The transcript from the *Forman* trial shall hereafter be cited as *FTT*, Vol. __ (docket number assigned to the transcript), followed by the date on which the testimony was given and the pages on which the testimony may be found.

guages, to put on their oxygen masks and to extinguish all cigarettes. *FTT*, Vol. 45 (Dec. 7, 1993) at 123. Captain McIntyre also testified that the data suggested that between nine (9) and twelve (12) minutes elapsed between when the Soviet missile hit Flight 007 and when the plane plunged into the Sea of Japan, from which Captain McIntyre opined that during that time, the pilots of Flight 007 must have maintained some control of the plane. *FTT*, Vol. 45 (Dec. 7, 1993) at 111-13, 118-20. Captain McIntyre also testified that after the oxygen masks deployed, the passengers would have had oxygen adequate to sustain consciousness until the plane crashed into the ocean. *FTT*, Vol. 45 (Dec. 7, 1993) at 126-27, 133-34.

Plaintiff's other expert, Commander Robert Elzy, was accepted as an expert in the area of aviation physiology. Commander Elzy explained to the jury how changes in ambient air pressure, including inadequate oxygen supply, affect the human body. *FTT*, Vol. 45 (Dec. 7, 1993) at 156-63. If the oxygen supply of an individual sitting quietly at 35,000 feet were rapidly disconnected, Commander Elzy testified that the individual would have a "useful conscious time" of between thirty-five (35) and forty-five (45) seconds before requiring supplemental oxygen, which means that for those seconds, the individual would be fully aware of what was happening in his or her surrounding environment and capable of taking responsive action, such as putting on an oxygen mask. *FTT*, Vol. 45 (Dec. 7, 1993) at 159. Commander Elzy also testified that assuming the passengers had their masks on, they would have been conscious during Flight 007's descent and would have experienced both physical pain and mental suffering, because of the effects of decompression and their awareness of their impending death as the plane plummeted toward the ocean. *FTT*, Vol. 45 (Dec. 7, 1993) at 177-84.

KAL also presented two expert witnesses whose testimony was relevant to the estate's claim for pre-death pain and suffering. The Court accepted Rudolf Kapustin as an expert in the fields of aircraft accident investigation, aircraft accident reconstruction, aviation safety, and accident prevention. Mr. Kapustin testified that the data suggested that almost

immediately after Flight 007 was hit by one or two Soviet missiles, the crew lost control of the plane. *FTT*, Vol. 59 (Dec. 9, 1993) at 53. Mr. Kapustin opined that Flight 007 climbed from 37,000 to 38,200 feet at a rate of 7,000 feet per minute, stalled, then went into an inverted roll. *FTT*, Vol. 59 (Dec. 9, 1993) at 53-55. According to Mr. Kapustin, the missile strike caused rapid decompression inside the passenger cabin and almost instantaneous failure of several of the plane's systems, causing the plane to stall and to disintegrate as it fell toward the sea. *FTT*, Vol. 59 (Dec. 9, 1993) at 54-59.

KAL also offered the testimony of Dr. Stanley Mohler, whom the Court accepted as an expert in the field of aviation medicine, including high altitude decompressions and the use and operation of emergency passenger oxygen systems. Dr. Mohler testified that assuming Flight 007 was cruising at approximately 35,000 feet above sea level at its normal speed of 500 miles per hour when it was hit by Soviet missiles, the passengers would have experienced surprise, confusion and euphoria before becoming unconscious approximately eleven (11) seconds after the missile strike. *FTT*, Vol. 60 (Dec. 10, 1993) at 25, 31-32. Dr. Mohler testified that cyclonic winds would have rushed through the cabin and that fog would have formed in the cabin, making it difficult for the passengers to see or to put on the oxygen masks. *FTT*, Vol. 60 (Dec. 10, 1993) at 25-26. If the passengers were able to don their masks, Dr. Mohler stated that the passengers would have lacked adequate oxygen because the masks leak, rendering them ineffective above 30,000 feet. *FTT*, Vol. 60 (Dec. 10, 1993) at 26. Even assuming Flight 007 made a semi-controlled descent for nine (9) to twelve (12) minutes, Dr. Mohler opined that the passengers would not have experienced pain because they would have been unconscious eleven (11) seconds into the descent. *FTT*, Vol. 60 (Dec. 10, 1993) at 33-35.

Despite KAL's vigorous attacks on the testimony of Plaintiff's experts as highly speculative, it should be readily apparent from the discussion above that the jury was presented with conflicting versions of what happened to Flight 007 after it

was struck by the missile. The testimony of Plaintiff's experts provided the jurors with circumstantial evidence from which they could conclude that the passengers on Flight 007 experienced pain and anguish prior to the plane's crash into the ocean. *See Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18, 23 (2d Cir. 1994), *cert. granted on other grounds*, 115 S.Ct. 1689 (1995). The instructions given to the jury stated that in order to award damages to Evelyn Forman's estate for pre-death pain and suffering, the jury had to find, by a preponderance of the evidence, that Evelyn Forman was conscious after the missile strike and that she survived for some period thereafter, during which she experienced physical pain and mental anguish resulting from that pain. *FTT*, Vol. 63 (Dec. 13, 1993) at 65-66.

The jury was free or reject the theories of either party's experts and to determine the amount of damages, if any, to which the decedent's estate was entitled. Given the testimony presented by Plaintiff's experts, the Court concludes that the jury award of $120,000.00 to the estate of Evelyn Forman for pre-death pain, suffering and fear of impending death was supported by the evidence and not excessive. KAL is not entitled to relief from the jury award to Evelyn Forman's estate for pre-death pain, suffering and fear of impending death.

B. *Claims of Plaintiff and of the Beneficiaries for Loss of Care, Comfort, Society, Companionship, Love and Affection*

KAL moves to strike the damages awarded to Plaintiff and to the Beneficiaries for loss of care, comfort, society, companionship love and affection ("loss of society"), arguing that such damages are not permitted under DOHSA, which KAL alleges exclusively governs the types of damages recoverable for wrongful deaths occurring on the high seas. Alternatively, KAL contends that even if loss of society damages are permitted, such damages may be recovered only by the decedent's financially dependent relatives.

KAL is correct that DOHSA does not permit recovery for nonpecuniary losses such as loss of society. *See Mobil Oil*

Corp., 436 U.S. at 623-25. As previously stated, DOHSA is not the exclusive remedy in this case because claims have been brought under both DOHSA and the Warsaw convention. The D.C. Circuit has not yet addressed the question of what types of damages are recoverable under the Warsaw Convention. However, the Second Circuit, in the interest of uniformity, has taken the position that damages under the Warsaw Convention are governed by general maritime law, which prohibits loss of society damages absent a showing of dependency. *Zicherman*, 43 F.3d at 21-22; *In Re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 37 F.3d 804, 829-30 (2d Cir. 1994).

In prior opinions addressing loss of society damages, this Court has held that the Warsaw Convention permits recovery for loss of society, so long as a claimant presents sufficient evidence of a relationship with a decedent from which a jury could find that a loss of society has occurred. *Maikovich v. Korean Air Lines, Co., Ltd.*, No. 83-3792, slip op. at 13 (D.D.C. Nov. 14, 1994); *Oldham v. Korean Air Lines, Co., Ltd.*, No. 83-3889, 1994 WL 725277, at *5 (D.D.C. Oct. 11, 1994); *Ocampo v. Korean Air Lines, Co., Ltd.*, No. 83-2941, 1994 WL 731569, at *1 (D.D.C. Sept. 16, 1994). Although KAL, prior to the Second Circuit's opinion in *Zicherman* argued that loss of society damages should be available to only the dependents of a decedent,[5] this Court refused to impose such a limitation because of the Court's view that the intent of the drafters of the Warsaw Convention was to provide broadly for damages sustained. *See Maikovich*, No. 83-3792, slip op. at 12-13; *Oldham*, No. 83-3889, 1994 WL 725277, at *5; *Ocampo*, No. 83-2941, 1994 WL 731569, at *1. In a similar vein, this Court declines to adopt the position taken by the Second Circuit in *Zicherman* and in *In Re*

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[5] In support of its position, KAL relies on cases such as *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990) (recovery for loss of society is not permitted in a general maritime action for the wrongful death of a Jones Act seaman), and *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1091-93 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1060 (1994) (in an action brought under admiralty law, nondependent parents of a decedent may not recover for loss of society).

Air Disaster at Lockerbie, Scotland that general maritime law governs the types of damages recoverable under the Warsaw Convention because such an approach, while adopted in part to foster the worthy goal of uniformity, fails to give adequate consideration to the intent of the drafters of the Convention or to the Convention's underlying purposes.

In *Forman*, there was ample testimony, including that from the decedent's husband, father and sister, regarding the close relationship shared by the decedent with each of her family members. *See, e.g.*, *FTT*, Vol. 58 (Dec. 8, 1993) at 127, 151-52; *FTT*, Vol. 77 (Dec. 6, 1993) at 125, 141-43. The decedent's parents and her sister Marisa Sinjian testified that Evelyn Forman, after moving to the United States, communicated with her family in the Philippines by sending written letters and audiotapes. *FTT*, Vol. 77 (Dec. 6, 1993) at 61-62, 121-22, 143. The decedent's parents also testified that Evelyn and Eric Forman visited them in the Philippines in February of 1983 and that Evelyn was returning to the Philippines to be with her family to celebrate her parents' thirty-fifth wedding anniversary when she was killed on Flight 007. *FTT*, Vol. 77 (Dec. 6, 1993) at 62-63, 122-23; *FTT*, Vol. 58 (Dec. 8, 1993) at 129. The decedent's father also testified that Evelyn Forman had promised to bring her younger sister Edna, who suffered from a learning disability, to the United States. *FTT*, Vol. 77 (Dec. 6, 1993) at 73.

In light of the testimony presented, this Court finds that Plaintiff and the Beneficiaries presented sufficient evidence from which the jury could find that damages for loss of society were appropriate. Since the Court also finds that the damages awarded for loss of society were not excessive, KAL is not entitled to relief with respect to these awards.

C. *Claims of Plaintiff and of the Beneficiaries for Grief, Mental Anguish and Sorrow*

KAL also contends that the damages awarded to Plaintiff and to the Beneficiaries for grief, mental anguish and sorrow accompanied by physical manifestations, are impermissible under the Warsaw Convention and therefore should be

stricken. Relying on *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991), KAL argues that recovery of nonpecuniary damages for grief, mental anguish and sorrow, is not allowed under the Warsaw Convention. Plaintiff interprets *Floyd* to permit recovery for mental anguish, provided that mental anguish is accompanied by physical manifestations.

In *Floyd*, an Eastern Airlines jet traveling from Miami to the Bahamas lost power in all three of its engines and plummeted toward the Atlantic Ocean for some period of time until the flight crew was able to restart one of the engines and land the plane at Miami International Airport without injury to any crew members or passengers. During the plane's descent, the passengers were told that "the plane would be ditched in the Atlantic Ocean." 499 U.S. at 533. Several passengers sued Eastern Airlines, bringing claims under the Warsaw Convention and state law, for mental distress suffered as a result of the incident.

The district court presiding over the passengers' suit ruled that recovery solely for mental anguish was not permitted under the Warsaw Convention. *In Re Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport on May 5, 1983*, 629 F. Supp. 307, 314 (S.D.Fla. 1986). In reversing, the Eleventh Circuit held that the authentic French phrase for bodily injury, "lesion corporelle," included recovery for purely mental injuries. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1480 (11th Cir. 1989).

In resolving a conflict between the Eleventh Circuit's decision and that of the N.Y. Court of Appeals in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385 (1974), the Supreme Court held in *Floyd* that Article 17 of the Warsaw Convention does not permit recovery for purely mental injuries. *Floyd*, 499 U.S. at 534. The Supreme Court's analysis focused first on the phrase "lesion corporelle," which the Court explained had been translated narrowly to mean "bodily injury," thereby excluding purely mental injuries. *Id.* at 536-42. In addition, the Court found no evidence suggesting that the drafters of the Warsaw Convention intended "lesion corporelle" to encompass psychic injuries, not only because few jurisdic-

tions recognized recovery solely for mental injuries,[6] but also because a narrower reading of "lesion corporelle" was consistent with the Convention's primary purpose of "limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry." *Id.* at 546.

Although the Supreme Court in *Floyd* held unequivocally that damages solely for mental anguish are not recoverable under the Warsaw Convention, the Court specifically declined to address the issue of whether passengers bringing claims under the Convention could recover for mental injuries accompanied by physical injuries. *Id.* at 552. The plaintiffs in *Floyd* were denied recovery for mental anguish, even though they had endured what must certainly have been a harrowing experience, one which they believed would end with a crash into the Atlantic Ocean. In contrast, neither Plaintiff nor the Beneficiaries in this case were on Flight 007, nor were they in a position either to witness the destruction of the plane or to have their own safety placed in jeopardy.

Traditionally, tort law has prohibited recovery for mental injuries to plaintiffs outside of the "zone of danger," or stated differently, to those plaintiffs whose physical safety was in no way jeopardized, and various federal statutes and laws pertaining to wrongful death claims have been interpreted to deny recovery for grief, mental anguish and sorrow. *See, e.g., Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974) (mental anguish or grief is not compensable under the maritime wrongful death remedy); *Gaston v. Flowers Transp.*,

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[6] Specifically, the Supreme Court explained that most common and civil law countries prohibited compensation for psychic injury in 1929 when the Convention was drafted, and therefore the Court concluded that "the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery." *Floyd*, 499 U.S. at 545. In addition, the Court supported its narrower reading of "lesion corporelle" by noting that in 1951, a committee comprised of twenty (20) signatories to the Warsaw Convention rejected a proposal by the French delegation to substitute "lesion corporelle" with "affection corporelle," a phrase which was understood by the French to encompass recovery for mental harm unaccompanied by physical injury. *Id.* at 546-47.

866 F.2d 816, 819-21 (5th Cir. 1989) (crew member who witnessed the death and injury of other crew members, without significant injury or fear of injury to himself, could not recover under the Jones Act for mental anguish); *Bullard v. Central Vermont Ry., Inc.*, 565 F.2d 193, 197 (1st Cir. 1977) (Federal Employers' Liability Act generally limits recovery for mental distress related to physical injury or to apprehension of such injury).[7] These principles, viewed in light of the Supreme Court's analysis in *Floyd* of both the text and purpose of the Warsaw Convention, lead this Court to conclude that the Convention does not permit recovery for mental anguish to nonpassenger plaintiffs outside of the zone of danger, even where those plaintiffs present some evidence of physical manifestations of their grief. *See Floyd*, 499 U.S. at 552 ("[r]ecovery for mental distress traditionally has been subject to a high degree of proof, both in this country and others"). Therefore, the jury's awards to Plaintiff and to the Beneficiaries for mental anguish, grief and sorrow shall be set aside.

D. *Claim of Eric Forman for Loss of Financial Contributions*

KAL also challenges the jury awards to Eric Forman of $92,300.00 for loss of financial contributions from September 1, 1983 until the date of the trial and of $300,000.00 for loss of future financial contributions, on the grounds that the awards were unsupported by the evidence. The phrase "loss of financial contributions" refers to lost earnings that Plaintiff contends the decedent would have amassed from employment during her natural life had she not been killed on Flight 007.

Testimony at trial established that Evelyn Forman, who spoke English fluently, received a bachelor of arts degree in 1973 in communications arts from Mary Knoll College, a

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[7] The Second Circuit has held that damages for mental injury are not available under the Warsaw Convention because federal maritime law, which the Second Circuit contends governs the types of damages recoverable under the Convention, precludes a decedent's survivors from recovering for grief or mental injury. *Zicherman*, 43 F. 3d at 23.

four-year university in the Philippines. *FTT*, Vol. 77 (Dec. 6, 1993) at 58; *FTT*, Vol. 58 (Dec. 8, 1993) at 131. From 1978 when the decedent came to the United States until sometime in January or February of 1983, she did not have a green card. *FTT*, Vol. 58 (Dec. 8, 1993) at 128. However, while in the United States, the decedent earned income by working for a travel agency and later as a motel clerk. *FTT*, Vol. 58 (Dec. 8, 1993) at 109, 116.

Testimony further established that the decedent and Plaintiff met in 1979, shortly after Plaintiff had started a garment business, which he ran from his home. *FTT*, Vol. 58 (Dec. 8, 1993) at 106-17. The decedent worked with Plaintiff to build his garment business, and as the personal relationship between the decedent and Plaintiff progressed, she became more involved in the sales aspect of the business. *FTT*, Vol. 58 (Dec. 8, 1993) at 106-17; *FTT*, Vol. 59 (Dec. 9, 1993) at 21. The decedent and Plaintiff began living together in 1981, and they were married in 1982. *FTT*, Vol. 58 (Dec. 8, 1993) at 113.

During their marriage until Evelyn Forman's death, the decedent and Plaintiff sustained themselves using his savings and her earnings from the motel, where she worked about four days a week. *FTT*, Vol. 58 (Dec. 8, 1993) at 116.[8] The decedent's W-2 forms from her jobs at the travel agency and the motel and her federal tax returns indicate that she reported the following income: $1,189.00 in 1980; $3,200.00 in 1981; $5,044.00 in 1982; and $5,253.00 in 1983. *FTT*, Vol. 58 (Dec. 8, 1993) at 167-69. Although the decedent obtained her green card early in 1983, she did not look for a new job at that time because she intended to return to the Philippines for her parents' anniversary celebration in September, 1983. *FTT*, Vol. 58 (Dec. 8, 1993) at 128-30.

Dr. Thomas Borzilleri, Plaintiff's expert economist who testified at the trial, calculated the present value of the dece-

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[8] Plaintiff testified that when he started his garment business in 1978 he had approximately $60,000.00 in savings that he had accumulated while working as a tax auditor for a state agency in New York. *FTT*, Vol. 58 (Dec. 8, 1993) at 106, 126, 164.

dent's lost earnings by determining the salary of an average female college graduate of the decedent's age, which Dr. Borzilleri stated would have been $19,804.00 in 1984, and then adjusting that figure to reflect the growth rate of earnings, reductions for personal consumption expenditures, and work-life expectancy. *FTT*, Vol. 58 (Dec. 8, 1993) at 195-96. Dr. Borzilleri stated that he used data reflecting the average earnings of female college graduates of the decedent's age to project her lost earnings, rather than her tax returns from 1980 through 1983, because he did not believe the tax returns reasonably reflected the decedent's earnings capacity since the decedent did not have a green card for most of those years. *FTT*, Vol. 58 (Dec. 8, 1993) at 202-04, 233-34. Dr. Borzilleri testified that based on his calculations, the decedent's lost earnings in 1993 dollars for the ten-year period between her death and the trial would be $92,294.00, and her future lost earnings in 1993 dollars would be $305,146.00. *FTT*, Vol. 58 (Dec. 8, 1993) at 215, 218.

Citing *Joy v. Bell Helicopter Textron, Inc.*,[9] KAL contends that the jury awards for loss of financial contributions were based solely on speculative testimony given by Plaintiff's expert economist. In *Joy*, an expert economist calculated the decedent's lost earnings based on four scenarios, three of which involved businesses in which the decedent had never engaged prior to his death. The defendant challenged the economist's testimony, arguing that "it was based solely on guesswork, speculation, and conjecture." 999 F.2d at 568. The D.C. Circuit agreed and concluded that the district court should have excluded the economist's testimony since the record contained "little, if any basis . . . for [the economist's] estimates of [the decedent's] future earning capacity." *Id.* at 569.

Plaintiff argues that the decedent's illegal immigrant status prevented her from finding employment commensurate with her education. Plaintiff further asserts that the decedent's low-paying jobs, which she held without her green card, understated her earnings potential, and that the economist's

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[9] 999 F.2d 549 (D.C. Cir. 1993).

calculations were reasonable projections of her future earnings. Plaintiff cites several federal and state cases in which courts have held that past earnings are not dispositive of future earnings capacity. *See, e.g., Croce v. Bromley Corp.*, 623 F.2d 1084, 1093-94 n.28 (5th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981) (testimony of employee similarly situated to decedent that after decedent's death, their employer reorganized its corporate structure, resulting in higher employee salaries, was permissible as evidence of decedent's lost future earnings); *Dickens v. United States*, 545 F.2d 886, 892-93 (5th Cir. 1977) (evidence that medical student killed in plane crash intended to become a surgeon was admissible where the decedent had survived the rigorous early years of medical school, had written a complex paper on neurosurgery, and had shown a clear interest and aptitude for becoming a surgeon).[10]

Plaintiff's reliance on cases such as *Croce* and *Dickens* is misplaced. In those cases, evidence was presented at trial from which a reasonable inference could be drawn regarding the decedent's career choice. By contrast, Plaintiff did not produce any evidence during the *Forman* trial regarding the type of employment Evelyn Forman would have sought after obtaining her green card had she not been killed. Although Plaintiff presented undisputed testimony that the decedent was employed from the time she came to the United States until her death and that she worked aggressively to help Plaintiff develop his business, this evidence in its most favorable light merely supports a hypothesis that the decedent would have continued to work.

Dr. Borzilleri completely disregarded the factual information developed in the record regarding Evelyn Forman's employment history and instead *boldly* asserted that the decedent would have entered the U.S. workforce and performed at a level equivalent to that of an average, college-educated

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[10] *See also Har-Pen Truck Lines, Inc. v. Mills*, 378 F.2d 705, 709-10 (5th Cir. 1967) ("past earnings are indicative but not conclusive" of future potential earnings where there is testimony to support the hypothesis that a decedent's income would have increased had the decedent lived).

female.[11] The decedent's tax returns were "reject[ed] out of hand" by Dr. Borzilleri. *FTT*, Vol. 58 (Dec. 8, 1993) at 234. Yet those tax returns show that the most the decedent earned in annual wages was $5,253.00 in 1983, a figure that stands in stark contrast to the $19,804.00 salary which Dr. Borzilleri contends an average, college-educated female of the decedent's age would have made in 1983. *See FTT*, Vol. 58 (Dec. 8, 1993) at 169.[12] In addition, Dr. Borzilleri did not attempt to determine the monetary value, if any, of the loss suffered by Plaintiff's garment business as a result of Evelyn Forman's death, nor did he indicate how the decedent's earnings projections would have differed had he assumed that she would continue to work with Plaintiff in his garment business rather than enter the workforce on a full-time basis. *See FTT*, Vol. 59 (Dec. 9, 1993) at 108-112; *FTT*, Vol. 60 (Dec. 10, 1993) at 100-01. The Court concludes that Dr. Borzilleri's testimony regarding the decedent's future earnings lacked factual basis, and that the testimony amounts to speculation and conjecture prohibited under *Joy*.[13] Since the jury awards to Plaintiff for loss of financial contributions from Sept. 1, 1983 to the date

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[11] Dr. Borzilleri's own testimony illustrates the speculative nature of his calculations. On cross-examination, he stated "If [Evelyn Forman] was capable of . . . working unconstrained in the labor force . . . and was unable to find work, we'd get one answer. If she found work and she simply wasn't worth what the average college graduate made, we'd get another answer. . . . I can't tell you much more than that. . . . [I]f the party is not an average college graduate in terms of ability, then my number is not on the money." *FTT*, Vol. 58 (Dec. 8, 1993) at 233.

[12] On cross-examination, Dr. Borzilleri admitted that the Census Data which he used to project the average earnings of a female, college graduate of the same age as the decedent reflected women who had participated in the U.S. workforce for approximately ten years. Dr. Borzilleri also stated that he could not determine from the Census Data whether women of immigrant status have the same earnings capacity as non-immigrant females. *FTT*, Vol. 58 (Dec. 8, 1993) at 230-31, 235-36.

[13] The Court notes that its ruling should not be interpreted to suggest that past employment history may never be disregarded when projecting earnings capacity. Rather, the record must provide a factual basis from which a reasonable inference may be drawn that past earnings do not fairly reflect one's future earnings capacity.

of trial and for loss of future financial contributions were based on Dr. Borzilleri's testimony, those awards shall be set aside.

Notwithstanding the Court's rejection of Dr. Borzilleri's methodology, the Court notes that there was absolutely no evidence presented at trial that would have enabled the jury to determine how much money Evelyn Forman and Eric Forman individually contributed to the couple's joint fund. Stated differently, there was no testimony from which the jury could reasonably ascertain what portion of Evelyn Forman's earnings if any, were available solely for the use of Plaintiff. *See, e.g., Weal v. Seltzer*, 873 F.2d 1453, 1466 (D.C. Cir. 1989) (jury must determine in wrongful death action what percentage of decedent's income was allocated for support of decedent's beneficiaries); *Moorehead v. Mitsubishi Aircraft Int'l, Inc.*, 639 F. Supp. 385, 402 (E.D.Tex. 1986), *aff'd in relevant part*, 828 F.2d 278, 291 (5th Cir. 1987) (decedent's beneficiaries may recover the monetary value of the benefits they had a reasonable expectation of receiving from decedent had decedent lived, including that portion of decedent's salary which would have been spent to support the beneficiaries).

The evidence presented at trial merely established that during the Forman's marriage, the couple shared whatever money they had and survived on Plaintiff's savings, which totalled approximately $60,000.00 in 1978, and Evelyn Forman's earnings, which ranged from a low of $1,189.00 in 1980 to a high of $5,253.00 in 1983. *FTT*, Vol. 58 (Dec. 8, 1993) at 157-61. On cross-examination, Plaintiff conceded that his savings were the primary source of funds used by his wife and him to survive. *FTT*, Vol. 58 (Dec. 8, 1993) at 157. On this record, the Court concludes that Plaintiff failed to establish by a preponderance of the evidence that he suffered pecuniary losses in the form of lost financial contributions as a result of Evelyn Forman's death, so Plaintiff is not entitled to damages awarded for said claims.

E. *Claim of Eric Forman for Loss of Services*

KAL also challenges the jury awards to Eric Forman of $80,000.00 for loss of services from September 1, 1983 until the date of the trial and of $200,000.00 for loss of services in the future, on the grounds that the awards were unsupported by the evidence. The phrase "loss of services" refers to the household services that Plaintiff alleges the decedent would have performed during her natural life and which would have benefited the Forman household had Evelyn Forman not been killed on Flight 007.

During the trial, Plaintiff testified that Evelyn Forman spent approximately three hours a day on "normal housekeeping chores," which included cooking, cleaning, laundry and other household duties. *FTT*, Vol. 58 (Dec. 8, 1993) at 131-32. Dr. Borzilleri explained to the jury that he made two, mutually exclusive calculations of the value of the household services Plaintiff lost. In one calculation, Dr. Borzilleri assumed that Evelyn Forman would have been employed in the workforce outside of the home and valued her household services to be 395,870.00 in 1993 dollars, while in the other he assumed that she would have been a full-time homemaker and valued her household services to be $426,377.00 in 1993 dollars. *FTT*, Vol. 58 (Dec. 8, 1993) at 197, 224-28, 242-45.[14]

There was ample testimony that Evelyn Forman intended to seek employment in the paid labor force once she obtained her green card, so the record provided a factual basis from which Dr. Borzilleri could infer that the decedent would have worked outside the home. *FTT*, Vol. 58 (Dec. 8, 1993) at 128-30. Moreover, Dr. Borzilleri explained to the jury his methodology for determining the monetary value of household services that Evelyn Forman would have provided had she not been killed. *FTT*, Vol. 58 (Dec. 8, 1993) at 224-28. Although Dr. Borzilleri was cross-examined regarding his rationale for making two separate calculations for the value of lost house-

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[14] These figures include the value of household services from September 1, 1983 until the date of trial plus the value of household services that would have been provided from the date of trial until the end of the joint life expectancies of Evelyn and Eric Forman.

hold services, KAL did not challenge the methodology that he used to make those calculations. Given that the record provided a factual basis for Dr. Borzilleri's calculations and that the jury awards for loss of household services were less than either of the calculations provided by Dr. Borzilleri, the Court concludes that the awards were supported by the evidence and not excessive.

Accordingly, it is by the Court this 6th day of June, 1995,

ORDERED, that Defendant KAL's Motion for Judgment as a Matter of Law be and hereby is GRANTED in part; and it is

FURTHER ORDERED, that the jury award to Anselmo Sinjian of $30,000.00 for mental anguish, grief and sorrow be and hereby is STRICKEN; and it is

FURTHER ORDERED, that the jury award to Leticia Sinjian of $60,000.00 for mental anguish, grief and sorrow be and hereby is STRICKEN; and it is

FURTHER ORDERED, that the jury award to Edna Sinjian of $20,000.00 for mental anguish, grief and sorrow be and hereby is STRICKEN; and it is

FURTHER ORDERED, that the jury award to Marisa Sinjian of $10,000.00 for mental anguish, grief and sorrow be and hereby is STRICKEN; and it is

FURTHER ORDERED, that the jury award to Babylon Marie Estrada of $10,000.00 for mental anguish, grief and sorrow be and hereby is STRICKEN; and it is

FURTHER ORDERED, that the jury award to Henry Sinjian of $10,000.00 for mental anguish, grief and sorrow be and hereby is STRICKEN; and it is

FURTHER ORDERED, that the jury award to Eric Forman of $55,000.00 for mental anguish, grief and sorrow be and hereby is STRICKEN; and it is

FURTHER ORDERED, that the jury award to Eric Forman of $392,300.00 for loss of financial contributions be and hereby is STRICKEN; and it is

FURTHER ORDERED, that the total judgment entered on December 7, 1994 of $2,151,050.00 be and hereby is AMENDED to $1,236,725.00, which reflects a reduction of $392,300.00 for damages awarded for financial contributions, and of $132,796.00 in prejudgment interest discounted by future losses associated with said damages; and a reduction of $195,000.00 for mental anguish, grief and sorrow damages, and of $194,229.00 in prejudgment interest discounted by future losses associated with said damages; and it is

FURTHER ORDERED, that in all other respects, Defendant KAL's Motion for Judgment as a Matter of Law be and hereby is DENIED.

/s/ AUBREY E. ROBINSON JR.
Aubrey E. Robinson Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5230 September Term, 1995

83cv03587

Filed: July 5, 1996

ERIC W. FORMAN,

Appellee,

—v.—

KOREAN AIR LINES, CO., LTD.,

Appellant.

Consolidated with 95-5231

Before:

SILBERMAN, WILLIAMS and ROGERS,

Circuit Judges

ORDER

Upon consideration of the petition for rehearing of appellant/cross-appellee filed June 20, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY: ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5230 September Term, 1995

83cv03587

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ERIC W. FORMAN,

Appellee,

—v.—

KOREAN AIR LINES, CO., LTD.,

Appellant.

Consolidated with 95-5231

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, *Circuit Judges*

ORDER

Upon consideration of the Suggestion for Rehearing *In Banc* of appellant/cross-appellee, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY: ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

Circuit Judge Henderson did not participate in this order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
MISC. NO. 83-0345

83-2793 DOOLEY
83-2940 SAAVEDRA
84-0331 BOYAR
84-0332 BOYAR
84-1710 CUNNINGHAM

Filed June 4, 1996

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983,

MEMORANDUM OPINION AND ORDER

On September 1, 1983, Korean Air Lines ("KAL") flight KE007 was shot down by a Soviet military aircraft, after it had veered off its course into Soviet airspace, killing all 269 passengers. The liability of KAL for those deaths was determined in a multidistrict litigation action in the District Court for the District of Columbia.[1] In that action, a jury found that KAL's "willful misconduct" proximately caused the passen-

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[1] An extensive discussion of the facts of this case may be found in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

gers deaths, thus allowing recovery beyond the Warsaw Convention's $75,000 cap on damages. *See* Warsaw Convention, Art. 25, 49 Stat. 3020; Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, *reprinted in note following* 49 U.S.C. App. § 1502 (1988 ed.). Following appeals of this action, the individual compensatory damages trials were remanded by the Judicial Panel on Multidistrict Litigation to the original transferor courts. Several actions regarding the recoverable compensatory damages still remain before this Court.

Presently before the Court is Defendant KAL's Motion to Dismiss Claims for Nonpecuniary Damages. Defendant argues that damages for loss of society, survivor's mental grief, and for predeath pain and suffering of a decedent are not recoverable. The parties agree that Plaintiffs' claims for loss of society damages must be eliminated in light of *Zicherman v. Korean Air Lines Co., Ltd.*, ___ U.S. ___, 116 S. Ct. 629 (1996). KAL's Motion raises two issues: (1) whether claims for mental grief, recoverable under Korean law, may be pursued in this Court after a choice of law analysis, and (2) whether survival damages for pre-death pain and suffering may supplement the wrongful death damages available under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.*

I. Discussion

Article 17 of the Warsaw Convention makes an airline liable for "damages sustained" in the event of the death of a passenger, it provides:

> The carrier shall be liable for *damages sustained* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 301 (emphasis added).

Until the Supreme Court's decision in *Zicherman*, ___ U.S. ___, 116 S. Ct. at 629, various courts struggled with the question of which "damages" are available under the Warsaw Convention. *See, e.g., In re Korean Air Lines*, 932 F.2d. at 1475 (D.C. Cir. 1991); *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2nd Cir.), *cert. denied, sub nom. Rein v. Pan American World Airways, Inc.*, 502 U.S. 920 (1991). With *Zicherman* the Court put some of this confusion to rest, holding that "damage" means only "legally cognizable harm" and that "Article 17 leaves it to the adjudicating courts to specify what harm is cognizable." 116 S. Ct. at 633. The Court found support for its interpretation of "damage" in Article 17 through the express limitations of Article 24 of the Warsaw Convention which provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, *without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.*

49 Stat. 3020 (emphasis added). Under the Court's interpretation of Article 24(2) when an "action is brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for." *Zicherman*, 116 S Ct. at 634. The Court concluded that "Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice of law rules." *Id.* at 637.

A. Choice of Law

Having concluded that compensable harm is determined by domestic law, the *Zicherman* Court explained that its next logical step would be to determine which sovereign's domestic law applied. The Court did not conduct a choice of law analysis because the parties had previously agreed that the issue of compensable harm was governed by United States law. The Court held, however, that where United States law governed, the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* (1988), supplied the substantive law of damages for an aircraft crash on the high sea. *Id.* at 636.

This Court has not been spared the choice of law question regarding which sovereign's domestic law governs compensable harm. Jurisdiction in these actions is premised on the federal treaty, the Warsaw Convention, 28 U.S.C. § 1331, admiralty, 28 U.S.C. § 1333, and in part on diversity. Here the parties are diverse because the Plaintiffs are citizens of the United States and the Defendant is a foreign nation. In *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941), the Court held that a federal court sitting in diversity must apply the choice of law principles of the state in which it sits. Because jurisdiction in these cases is based only partly on diversity, application of the District of Columbia's choice of law rules is not necessarily required, especially in light of a potential conflict between the District of Columbia and a federal policy. In *O'Melveny & Meyers v. F.D.I.C.*, ___ U.S. ___, 114 S. Ct 2048; 2055 (1994), the Court explained that a special federal rule is justified in "limited situations where there is a 'significant conflict between some federal policy or interest and the use of state law.' "

The Court recognizes that there is "no federal general common law," *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), but is guided by the Court of Appeals for the Sixth Circuit's determination that the Warsaw Convention's, "concrete federal policy of uniformity and certainty" would be undermined

if a state choice of law rule is applied, and therefore a special federal rule is appropriate to govern this choice of law question. *Bickel v. Bowden*, __ F.3d __, 1996 WL 203349 at *3 (6th Cir. 1996). In discussing the important federal policy of uniformity and certainty embodied by the Warsaw Convention, the Court of Appeals for the Second Circuit explained:

> The principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws. . . . Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. We do not see how the existence of state law causes of action could fail to frustrate these purposes.

In re Air disaster at Lockerbie, Scotland, 928 F.2d. 1267, 1275 (2nd Cir. 1991). Application of the United States' various choice of law rules could have a deleterious effect on consistent determinations of the applicable rules regarding damages under the Warsaw Convention. Thus, this Court is convinced that a federal choice of law rule is necessary here.

In the absence of any established body of federal choice of law rules, courts have looked to the Restatement (Second) of Conflict of Laws (1969) (hereinafter "Restatements") as "a source of general choice of law principles and an appropriate starting point for applying federal common law in this area." *See Bickel*, at * 3; *Harris v. Polskie Line Lotnicze*, 820 F.2d. 1000, 1003 (9th Cir. 1987). Section 175 of the Restatements provides a choice of law rule (known as the *lex loci delicti* rule) for a wrongful death action and creates a presumption in favor of law of the location where the injury occurred:

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatements, § 175. The *lex loci delicti* rule in § 175 is difficult to apply in these cases because "it is not clear whether KE007 was shot down in Soviet airspace, over Japanese territory or in international waters." *In re Korean Air Lines*, 932 F.2d. at 1497 (Mikva, J. dissenting). Additionally, the Sixth Circuit recognized that assuming that the former U.S.S.R. was the place the injury occurred, "the U.S.S.R. is ceased to exist . . . [and therefore] no longer has a judicially cognizable interest in these matters." Furthermore, the parties have limited their choice of law arguments to whether the United States or the law of Korea applies, and the Court finds that these countries should be the focus of the choice of law determination.

"In lieu of the *lex loci* rule, § 6 of the Restatements endorses a "most significant relationship" or "center of gravity" test, which requires consideration of several factors to determine which state has a more significant interest in having their law applied. "The governmental interest approach seeks to identify which jurisdictions may have an actual interest in having their substantive law apply to a particular controversy. . . ." *See In re Korean Air Lines*, 932 F.2d at 1497 (Mikva, J. dissenting). The relevant factors of § 6 include:

> (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and

(g) ease in the determination and application of the law to be applied.

When considering the contacts of the two countries the Court notes that South Korea is KAL's place of incorporation, its principal place of business, and the place where its crews are trained. On the other hand, the United States is the place of embarkation for many of the passengers, where the flight originated, and where all of the tickets were purchased.

Though both the United States and South Korea have significant contacts, consideration of the factors in § 6 convinces this Court that the United States law should govern these cases. The Court agrees with the analysis of the Sixth Circuit that "application of United States law supports 'ease in the determination and application of the law applied' " and " 'the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,' " weigh heavily in the favor of this United States." *Bickel*, at * 4. Indeed, "certainty, predictability, and uniformity of result" would be supported because the Supreme Court has already applied the United States law when determining compensatory damages. *See Zicherman*, 116 S. Ct. at 629; *In re Korean Air*, 932 F.2d at 1475.

Furthermore, this Court agrees that because "these actions arise under the Warsaw Convention, neither nation can legitimately claim to offer greater protection of the 'the basic policies underlying the particular field of law,' or 'the needs of the interstate and international system.' " *Bickel*, at *4. Accordingly, the Court finds that the United States law is the most appropriate when determining the available compensatory damages for these actions.

B. Loss of Society and Survivor's Grief

In light of the Supreme Court's decision in *Zicherman*, that DOHSA, supplies the substantive United States law regarding damages and that loss of society damages are not available under DOHSA this Court concludes that survivor's grief dam-

ages are also unavailable.[2] The *Zicherman* Court held that under § 762 of DOHSA recovery in a suit for death under § 761 "shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefits the suit is brought." 46 U.S.C. App. § 762. Following the dictates of DOHSA, the Court concluded that loss-of-society damages, since they are not pecuniary, may not be recovered.

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[2] Because this Court has determined that United States law governs the damages issues in this action and that DOHSA applies, Plaintiffs' argument that mental grief damages are available because Korean law permits claims for such damages is irrelevant.

Additionally, the Court rejects Plaintiffs' assertion that sections 1 and 4 of DOHSA are cumulative. 46 U.S.C. App. §§ 761, 764. Following Plaintiffs' interpretation of DOHSA, they are entitled to recover all pecuniary damages allowed by virtue of § 1 of DOHSA and in addition any damages allowed by Korean law pursuant to § 4. The Court finds that sections 1 and 4 are mutually exclusive rather than cumulative. *See In re Air Crash Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175 (W.D. Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij N.V.*, 188 F. Supp. 594 (S.D.N.Y. 1960). Section 1 of DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Colombia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S C. App. § 761. Section 4 provides:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States . . . .

42 U.S C. App. § 764. The Court finds that while § 4 permits a cause of action based upon foreign law to be brought in admiralty in federal court, it only applies when foreign law applies pursuant to a choice of law analysis. In this case, it has been determined that United States law governs therefore the Court finds that § 4 is inapplicable and that only § 1 governs damages.

Damages for a survivor's grief are a non-pecuniary form of damages which represents compensation for an emotional response to wrongful death. *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974). The Supreme Court has previously recognized that although federal maritime law permits dependent survivors to recover loss of society damages, it precludes survivors from recovering additional damages for their grief or mental injury. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 (1978). Having concluded in *Zicherman* that DOHSA precludes recovery for the nonpecuniary damages such as loss of society, survivor's grief should be similarly unavailable. The court agrees with the Sixth Circuit that there is no "distinction of which the *Zicherman* Court would have approved that would permit us to conclude that the recovery of one sort of non-pecuniary damages, such as loss of society, is precluded by DOHSA, whereas other sorts of non-pecuniary damages, such as survivor's grief, are not." *Bickel*, at *5.

C. Survival Actions for Pre-Death Pain and Suffering

Plaintiffs also argue that DOHSA limits recovery for only wrongful death claims and does not preclude additional recovery for pre-death pain and suffering because it is a survival claim.[3] There is no dispute that recovery for the decedents' alleged pre-death pain and suffering is not recoverable under DOHSA.[4] Rather, Plaintiffs argue that their survival claims are distinct from wrongful death claims and are available under general maritime law and can supplement the damages recoverable under DOHSA.

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[3] "A wrongful death cause of action belongs to the decedent's dependents. . . . A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the deceased from the action causing death." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622 (3d Cir. 1994); *aff'd* __ U.S. __, 116 S. Ct. 619 (1996).

[4] DOHSA is a wrongful death statute that restricts recoverable to the "pecuniary loss sustained." 46 U.S.C. App. § 762.

This Court disagrees. Although, other courts have allowed a pain and suffering claim to supplement the awards recoverable under DOHSA, it appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles.[5] The Court explained where DOHSA applies neither state law, nor general maritime law, can provide a basis for recovery of loss-of-society damages." *Zicherman*, 116 S. Ct. at 636 (citations omitted): *See also Higginbotham*, 436 U.S. at 618 (federal maritime law is not available to supplement DOHSA because with DOHSA congress specifically spoke to the issue of damages and provided damages only for pecuniary losses, the Court may not provide supplementary damages beyond that authorized by Congress). Therefore, in light of the Supreme Court's decision in *Zicherman*, this Court finds that the non-pecuniary pain and suffering damages may not supplement the damages available under DOHSA.

II. Conclusion

For the foregoing reasons, it is by the Court this 4th day of June, 1996,

ORDERED, that Defendant's Motion to Dismiss All Claims for Non-Pecuniary Damages be and hereby is GRANTED; and it is

FURTHER ORDERED, that Plaintiff's claims for loss of society damages, mental anguish and grief, and pre-death pain and suffering be and hereby are DISMISSED with prejudice.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

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[5] In cases decided prior to *Zicherman*, several courts used general maritime survival principles to supplement the pecuniary damages available under DOHSA, with pain and suffering damages. *See e.g., Barbe v. Drummond*, 507 F.2d 795, 800 (5th Cir 1974); *McAleer v. Smith*, 791 F. Supp. 923, 926 (D.R.I. 1992).

ORDER

Upon consideration of the Joint Motion for an Order Amending Order of June 4, 1996 to Include Statutory Language From 28 U.S.C. 1292(b) to Certify the Court's Order of June 4, 1996 for an Interlocutory Appeal and a Joint Motion for a Stay, it is by the Court this 1st day of July, 1996,

ORDERED, that the above-captioned actions be and hereby are STAYED until further Order of the Court; and it is

FURTHER ORDERED, that the Joint Motion for certification of this Court's Order of June 4, 1996 to the Court of Appeal for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), be and hereby is GRANTED; and it is

FURTHER ORDERED, that this Court's Order of June 4, 1996 be and hereby is amended to state:

Certification for Interlocutory Appeal

Generally, appellate review of a trial court's decision is only appropriate upon an appeal from a final judgement in the trial court, that is, only after all the issues involved in a particular lawsuit have been finally determined. See F. James and G. Hazard, Civil Procedure § 12.4 at 657 (1985). However, in 1958 Congress created a statutory exception to the final judgment rule, codified at 28 U.S.C. § 1292(b). Section 1292(b) provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . .

Thus, an interlocutory appeal can be properly certified only where the district court and the appellate court agree that (1) an order involves a "controlling question of law"; (2) this controlling question of law is one upon which "there is substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The within action are governed by the Warsaw Convention, Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Star. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 1502. The liability of Korean air for the death of all passengers on Korean Air Lines Flight KE007 has previously been established. See In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475 (D.C.Cir.), cert. denied 502 U.S. 994 (1991). The actions remaining in this Court assert recovery for damages and are postured following the Supreme Court's decision in Zicherman v. Korean Air Lines Co., Ltd., ___ U.S. ___, 116 S.Ct. 629 (1996), which held that the wrongful death cause of action is covered by the Death on the High Seas Act, 46 U.S.C.App. § 764 et seq. ("DOHSA"). Specifically, Plaintiffs claim a right to recover damages for mental anguish and grief pursuant to 28 U.S.C. § 764 under Korean law and that there is a general maritime survival action separate and distinct from the wrongful death action under DOHSA which may co-exist with the wrongful death action.

The Court has granted Korean Air Lines' Motion to Dismiss all claims for nonpecuniary damages holding that mental anguish and grief damages may not be recovered and that a general maritime survival action may not supplement wrongful death damages under DOHSA. The pending issues have never been addressed by the United States Court of Appeals for the District of Columbia and were not addressed in Zicherman, ___ U.S. ___, 116 S.Ct. at 629.

The parties are of the opinion that the recoverable damages issues involve controlling questions of law which are of sig-

nificant importance to the remaining damages trials currently pending in this Court and that there are substantial grounds for differences of opinion. The parties are further of the opinion that an immediate appeal from this Order will materially advance the ultimate termination of the remaining litigation.

This Court agrees. During the many years that this litigation has been in this Court and in the other district courts and circuit courts across the United States questions regarding recoverable damages have repeatedly confounded the courts. Complicating the determination of available damages are circuit splits and the interplay between the Warsaw Convention, DOHSA, and general maritime law. With the Supreme Court's opinion in Zicherman, a major step was taken towards resolving the difficult question of available damages under the Warsaw Convention. Guidance from the Court of Appeals for the District of Columbia Circuit regarding: (1) the availability of mental anguish and grief damages; and (2) the availability a survival action for pain and suffering damages in light in Zicherman, will hopefully assist in terminating these action once in for all. Therefore the Court certifies this Order dismissing Plaintiffs' claims for nonpecuniary damages for an immediate interlocutory appeal.

It is FURTHER ORDERED, that above-captioned cases be and hereby are certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because they involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of this litigation.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1995
83cv03587

No. 95-5230
Filed February 22, 1996

ERIC W. FORMAN

—v.—

KOREAN AIR LINES CO., LTD.,

Appellant

And cross-appeal No. 95-5231

Before:

BUCKLEY, WILLIAMS, and ROGERS,

Circuit Judges

ORDER

Upon consideration of the motion Korean Air Lines for leave to file a supplemental brief, and the opposition thereto, it is

ORDERED that the motion be granted. KAL shall argue the significance of the United States Supreme Court's decision in *Zicherman v. KAL*, 116 S. Ct. 629 (Jan. 16, 1996), in its reply

brief due on February 28, 1996. The appellee/cross-appellant shall respond to KAL's arguments in his reply brief, due March 13, 1996.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: CHERI CARTER
Deputy Clerk/LD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
CIVIL ACTION NOS.
83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788

Filed April 8, 1993

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1993,

MEMORANDUM OPINION

Before the Court are several pretrial motions filed by the defendant and plaintiffs in these case. They include: (1) KAL's motion requesting that Plaintiffs' damages be limited to those recoverable under the Death On the High Seas Act ("DOSHA"); (2) KAL's motion for partial summary judgment for decedents' Pre-death Pain and Suffering Claims; (3) KAL's Motion in Limine to Exclude the testimony of Experts on Pre-death Pain and Suffering; (4) KAL's Motion in Limine to Exclude any and all reference and evidence of KAL's negligence and wrongful misconduct; and (5) Plaintiffs' Motion for Prejudgment Interest.

A. Applicable Law

Defendant argues that the determination of damages in these cases should be governed exclusively by the Death on the High Seas Act (DOSHA), 46 U.S.C. § 761 *et seq*. Plaintiffs contend that since these claims are brought pursuant to the Warsaw Convention, DOSHA cannot limit the damages recoverable. This Court agrees.

As this Court stated previously, DOSHA is not the exclusive remedy in these cases. The Court has jurisdiction based concurrently on 28 U.S.C. § 1331 (Federal Question, i.e. the Warsaw Convention) and on DOSHA. To hold that the conflicting portions of DOSHA supersede those of the Convention would "render the Convention meaningless insofar as it relates to aircraft accidents which occur on the high seas more that a marine league from the shore." *See* In re Korean Air Lines Disaster of September 1, 1993 (March ___, 1992) slip. op at 7.

The Warsaw Convention allows for the recovery of all "damages sustained" and does not limit who may bring the suit as long as they can prove the loss. The Court of Appeals for the District of Columbia has held that "damages sustained" refers to actual harm experienced. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485 (D.D.C. 1991). To the extent that this is contrary to the provision of DOSHA, the Warsaw Convention shall prevail. Accordingly, defendant's Motion is DENIED.

B. Motions Concerning Pre-death Pain and Suffering

Defendant moves for partial summary judgment of decedents' pre-death pain and suffering claims and requests that the court exclude the experts who will testify about the claims. KAL argues that the claim and all testimony in support of the claim is based on speculation and conjecture. Plaintiffs argue that there is sufficient evidence to produce a material question of fact that makes summary judgment inappropriate. Further, they contend that the experts' opinions are

based on provable facts and will assist there trier of fact in understanding the evidence or determining a fact in issue.

The Court concludes that summary judgment is not appropriate in this instance. A question of fact exists as to what took place on board the plane after the missile strike. The resolution of this matter is material to the pre-death pain and suffering claims. Therefore, the motion for partial summary judgment is DENIED. The admission of the expert testimony is an evidentiary matter that can only be properly determined during the course of the trial. To the extend that Plaintiffs can provide the evidence necessary to sustain these claims, it will be heard by the jury.

C. Reference to KAL's "Willful Misconduct"

Plaintiffs will not be allowed to make mention of KAL's negligence or "willful misconduct" during voir dire or the presentation of evidence in this case. The liability of the defendant is not at issue in these proceedings and any mention of the jury's findings would be unduly prejudicial to the defendant. However, the jury must be told how the litigation got to this point. Therefore, the parties are to stipulate to a statement concerning the events that led to the crash that may be used in the openings and closings in these cases. This statement should be submitted to the Court no later than the close of business on April 19, 1993.

D. Prejudgment Interest

Plaintiffs request that the Court award them prejudgment interest at the prime rate from the date of the incident. The defendant argues that Plaintiffs are not entitled to such interest due to their vigorous pursuit of punitive damages. KAL contends that if the Court determines that prejudgment interest is appropriate, it should be award from the date the Supreme Court denied certiorari and at the 52-week Treasury Bill rate.

The Court finds no merit in KAL's argument to preclude the awarding of prejudgment interest. Accordingly, Plaintiffs will receive prejudgment interest on their damage awards. However, a Determination of the rate of interest will be made at a later date.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

DATE: April 8, 1993

Relevant Provisions of The Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Supreme Court, U.S.
FILED
OCT 22 1996
CLERK

(2)

No. 96-530

In The

Supreme Court of the United States

October Term, 1996

KOREAN AIR LINES CO., LTD.,

Petitioner,

v.

ERIC W. FORMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JUANITA M. MADOLE
SPEISER, KRAUSE, MADOLE & COOK
(*Counsel of Record*)
Two Park Plaza, Suite 1060
Irvine, California 92614
(714) 553-1421

Attorney for the Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

QUESTIONS PRESENTED FOR REVIEW

The questions as framed by the Petitioner seriously misstate the condition of the record below and the decision by the United States Court of Appeal for the District of Columbia Circuit. An accurate review of the record shows that the Petition for Writ of Certiorari on the issue of whether damages for pre-death pain and suffering are legally cognizable is not ripe for review by this Court because the D.C. Circuit refused to address the substantive issue on the grounds of procedural deficiencies in Korean Air Lines briefing. The questions presented by the Petitioner are more properly stated as follows:

1. Where this Court's decision in *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996) only addressed wrongful death damages and not the existence of a general maritime law survival action for pre-death pain and suffering, does *Zicherman* have any precedential value, as argued by Korean Air Lines ("KAL"), to the D.C. Circuit's refusal to address the legal availability of a pre-death pain and suffering claim?

2. Can the issue of whether there is a legal right to assert a claim for pre-death pain and suffering, which was not passed upon substantively in the lower court, be raised for the first time in the Petition for Writ of Certiorari?

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TREATIES, STATUTES AND RULES

Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq* 2

BRIEF IN OPPOSITION

Respondent, Eric W. Forman, individually and as Administrator of the Estate of Evelyn Forman, deceased, respectfully requests this Court to deny the Petition of Korean Air Lines for a Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Forman v. Korean Air Lines*, 84 F.3d 446 (D.C. Cir. 1996).

STATEMENT OF THE CASE

Pursuant to Supreme Court Rules 15.1 and 15.2, Eric W. Forman presents the following statement of the case to address the Petitioner's omissions and to supplement the statement of the case presented by the Petitioner. Respondent agrees with Korean Air Lines ("KAL"), however, that the decedent, Evelyn Forman, was killed while a passenger on board KAL flight KE007 on September 1, 1983 and that he brought the action in both his individual capacity and in his fiduciary capacity as Administrator of the estate for his benefit, and for the benefit of the estate of the decedent, for her parents, and for her siblings.

A. Proceedings in the District Court.

Plaintiff's Complaint asserted two distinct causes of action against KAL: a wrongful death cause of action and, as the Administrator of the decedent's estate, a survival cause of action for the decedent's pre-death pain and suffering.

In pretrial motions, KAL moved to limit wrongful death damages to those available under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.*, and argued that DOHSA's pecuniary remedies may not be supplemented by non-pecuniary remedies for pre-death pain and suffering under either state law or general maritime law in a survival action. The District Court held that, as to wrongful death remedies, Article 17 of the Warsaw Convention provided the basis for recovering "damages sustained" and does not limit who may bring the suit as long as they can prove the loss. Petition A[1] at 53a. Further, "to the extent that this is contrary to the provisions of DOHSA, the Warsaw Convention shall prevail". *Id.* As to the survival cause of action for pre-death pain and suffering, the District Court made no statement as to the basis for the remedy, but concluded that a Motion for Summary Judgment was not appropriate as there were questions of fact as to what occurred on board the airplane, which questions were material to the pre-death pain and suffering claims. Petition A 53a-54a.

At the conclusion of a jury trial, the jury awarded wrongful death damages for loss of support, loss of services, loss of society, and mental anguish and grief to decedent's husband, Eric W. Forman, and for loss of society and mental anguish and grief to decedent's parents and siblings. The jury awarded a separate category of damages to Eric W. Forman, as Administrator of the estate of his deceased wife for her pre-death pain and suffering.

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[1] "Petition A" refers to the Appendix to KAL's Petition for Writ of Certiorari.

KAL made a post-trial motion for judgment as a matter of law. The District Court reaffirmed its pretrial decision permitting recovery for loss of society damages as created under the Warsaw Convention. Petition A 19a-21a. The District Court also reaffirmed the existence of the survival action claim for the decedent's pre-death pain and suffering created by the Treaty. Petition A 15a-16a. The District Court further set aside the damage awards for survivor's grief as not recoverable as a matter of law under the Warsaw Convention on the basis of this Court's decision in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) and because the Plaintiffs were outside of the "zone of danger." Petition A 22a-24a[2].

B. The Appeal to the United States Court of Appeals for the District of Columbia Circuit.

KAL appealed to the United States Court of Appeals for the District of Columbia Circuit and Respondent cross-appealed.

In its appellant's "Statement of Issues to be Raised on Appeal," KAL raised only the following issues: (1) whether the District Court erred in holding that non-pecuniary damages for loss of society may be recovered in an action governed by the Warsaw Convention (citation omitted) when the death occurs on the high seas within the meaning of the DOHSA (citation omitted) or, in the alternative, whether the District Court erred in

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[2] The District Court also set aside the damage award for loss of financial contributions. This award was reinstated by the Court of Appeals. Petition A 6a-8a.

holding that non-pecuniary damages for loss of society are recoverable by the decedent's financially non-dependent relatives; (2) whether the District Court erred in finding the damage award for the decedent's pre-death pain and suffering was supported by proper and sufficient evidence; (3) whether the District Court erred in finding the damage award for loss of services was supported by proper and sufficient evidence and not excessive; and (4) whether the District Court erred in the calculation and award of pre-judgment interest.

At no time in the pre-briefing filings with the D.C. Circuit, nor in any of the initial briefs, did KAL challenge the legal right of the Administrator of decedent's estate to assert a survival cause of action for pre-death pain and suffering.

While the appeal was pending in the Court below, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996). *Zicherman* addressed only the issue of the recoverability of loss of society damages for a case governed by the Warsaw Convention in which the deaths occurred on the high seas. The Court held that the Warsaw Convention was merely a pass-through and that whatever law would ordinarily be applied as the substantive damage law should be applied in a Warsaw-governed case. *Id.* at 636. Where the deaths occurred on the high seas, the *wrongful death* measure of damages is contained in DOHSA. *Zicherman* did not discuss the existence or extent of any survival action remedy for pre-death pain and suffering.

After the Court's decision in *Zicherman*, KAL moved the court below for permission to submit a supplemental

brief. At the posture of the case when the request was made, each party had yet another brief to file. The court below granted leave to address issues raised by *Zicherman* in the briefs yet to be filed.

In its opinion, the court below refused to excuse KAL's tardiness in raising the issue of the legal availability of a right to recover for pre-death pain and suffering, noting that the argument that such damages are not available if DOHSA applies had been raised numerous times before *Zicherman* was decided. *Forman* at 448.

REASONS FOR DENYING THE PETITION

I. *Zicherman* did not address the survival cause of action, so the court below was not required to apply any precedential value to *Zicherman*.

KAL argues that the decision of the court below was in conflict with this Court's decision in *Zicherman* and that the *Zicherman* rationale should be applied retroactively to pending cases, thus eliminating the *Forman* verdict for pain and suffering. Petition at 9-10. However, *Zicherman* does not stand for what KAL says it does.

In *Zicherman*, the Court held the Warsaw Convention acts as "nothing more than a pass-through, authorizing [the Courts] to apply the [damage] law that would govern in absence of the Warsaw Convention." 116 S. Ct. at 636. *Zicherman* only addressed the wrongful death cause of action and measure of damages for deaths that occur on the high seas. However, if one used the "pass-through" procedure on the issue of a survival action for

pre-death pain and suffering, the Court would apply the general maritime law survival cause of action for pre-death pain and suffering and sustain the jury's verdict. This Court has several times implied, without deciding, that there exists a general maritime law survival cause of action for pre-death pain and suffering. *See, Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990) (noting that several Courts of Appeal had identified a general maritime survival cause of action for pre-death pain and suffering); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76 n.2 (1974) (noting the distinction between the wrongful death remedies and survival action remedies); *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 625 n.7 (1996) (assuming without deciding that *Moragne*[3] encompasses a general maritime survival cause of action).

Several lower courts have specifically identified a general maritime law survival cause of action for pre-death pain and suffering which may be brought simultaneously with a wrongful death action under DOHSA. *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Azzopardi v. Ocean Drilling and Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984); *Law v. Sea Drilling Corp.*, 523 F.2d 793, 794-95 (5th Cir. 1975); *Gray v. Lockheed Aeronautical Systems Co.*, 880 F. Supp. 1559, 1569 (N.D. Ga. 1995); *Rye v. United States Steel Mining Co.*, 856 F. Supp. 274, 279 (E.D. Va. 1994); *Chute v. United States*, 466 F. Supp. 61, 69 (D. Mass. 1978); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F. Supp. 1277, 1285 (W.D. Pa. 1983); *Favoloro v. S/S Golden Gate*, 687 F. Supp. 475, 479 (N.D. Cal. 1987). *But see, Saavedra v. Korean Air Lines*, 93 F.3d 547, 550-554 (9th Cir.

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[3] *Moragne v. States Marine Lines*, 398 U.S. 375 (1970).

1996), Petition for Writ of Certiorari filed October 18, 1996, Docket No. 96-623. Thus, this Court's direction that a pass-through occur would point directly to the survival action remedy under general maritime law for pre-death pain and suffering. Nothing else in the *Zicherman* decision contradicts that result.

KAL argues that "*Zicherman* obligated the Court below to address the question whether non-pecuniary pre-death pain and suffering damages are recoverable under DOHSA, the applicable domestic law in this case," (citation omitted) Petition at 10. In this regard, KAL seriously misstates the *Zicherman* obligation which only requires courts to apply DOHSA to wrongful death remedies. Respondent asserted in the court below that damages for pre-death pain and suffering are created by general maritime law in a *survival action* and *not* as part of the separate, distinct, and identifiable remedies in the wrongful death cause of action under DOHSA.

Because *Zicherman* did not address survival action damages, the court below was not obligated to use it as precedent when it declined to address the issue of the legal availability of survival action damages because of KAL's procedural deficiencies.

Moreover, the decision of the court below is not, as KAL asserts, in direct conflict with the erroneous decision from the Ninth Circuit in *Saavedra, supra*. In *Saavedra*, the Ninth Circuit addressed the substantive issue of the legal availability of the survival cause of action and improperly ignored the distinction between survival remedies and wrongful death remedies, by holding that the damages for pain and suffering were not recoverable. In contrast,

the Court below did not address the substantive issue, but refused to address it because of KAL's failure to initially raise the issue.

The KE007 litigation has been lengthy and torturous. The issue of the availability of a general maritime law survival cause of action for pre-death pain and suffering should be directly addressed by the Court, but not in this Petition. The court below refused to address the substantive issue and this Court would not have the benefit of the lower court's reasoning and analysis in reviewing the matter. Rather, the Court should grant *certiorari* in *Saavedra, supra,* and reverse the Ninth Circuit's erroneous reading of *Zicherman.*

II. The court below refused to address the substantive issue so it cannot be raised for the first time in the Petition for Writ of Certiorari.

KAL was well aware of the distinction between wrongful death damages and survival action damages. Indeed, it argued in the District Court that non-pecuniary damages for pain and suffering should not be awardable. On appeal, it made a tactical decision. It did not address the legal availability of survival action damages in the initial stages of the appeal, but only challenged the sufficiency of the evidence to support the jury's verdict. Because KAL had not preserved the issue, the court below refused to address it. 811 F.3d at 448. This Court would not normally hear an issue that had not been raised or resolved in the lower court, *Youakim v. Miller,* 425 U.S. 231, 234 (1976); *Illinois v. Gates,* 462 U.S. 213,

218-19 (1983) (referring to appeals from state courts), and should not in this case.

KAL's argument to the contrary, *Zicherman* did not change the state of the law that DOHSA does not permit non-pecuniary damages for pre-death pain and suffering *as a wrongful death element of damage. See, Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir. 1996), *amended on reh'g*, ___ F.3d ___, 1996 W.L. 490375 at 4 (6th Cir. Aug. 29, 1996), petition for rehearing *en banc* denied Oct. 10, 1996:

> The *Zicherman* opinion therefore neither added to, nor made any changes in, the law regarding the availability of non-pecuniary damages under DOHSA. Thus, any argument that KAL could make based on the fact the DOHSA does not allow non-pecuniary damages was available to it before the court decided *Zicherman* and therefore KAL could have raised this issue in its opening briefs. [footnote omitted].

Since *Zicherman* did not change the law and since KAL had abandoned its challenge of the legal availability of pain and suffering damages, it cannot be permitted a "second bite of the apple," particularly where there is no substantive analysis of the issue in the court below for this Court to consider.

CONCLUSION

For the reasons stated herein, this Honorable Court is respectfully requested to deny the Petition.

Dated: October 22, 1996

Respectfully submitted,

SPEISER, KRAUSE, MADOLE & COOK

Attorneys for Respondent

JUANITA M. MADOLE
Two Park Plaza, Suite 1060
Irvine, CA 92614
(714) 553-1421

No. 96-530

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KOREAN AIR LINES CO., LTD.,

Petitioner,

—v.—

ERIC W. FORMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

GEORGE N. TOMPKINS, JR.
ANDREW J. HARAKAS*
TOMPKINS, HARAKAS, ELSASSER
& TOMPKINS
Courthouse Square
140 Grand Street
White Plains, New York 10601
(914) 428-2525

Counsel for Petitioner
KOREAN AIR LINES CO., LTD.

* *Counsel of Record*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

The Opposition to the Petition ("Opp.") demonstrates a fundamental misunderstanding of the proceedings in the district court, the court below and the interpretation of the Warsaw Convention[1] by the Court in *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996).

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. § 40105.

ARGUMENT

I. Article 17 of the Warsaw Convention Was the Sole Legal Basis for the Award of Nonpecuniary Pre-Death Pain and Suffering Damages in this Case

Respondent attempts to obfuscate the basis of the district court's ruling by improperly accusing Petitioner KOREAN AIR LINES CO., LTD. ("KAL") of misstating the questions presented for review and the record below.

Prior to trial, KAL filed three *separate* motions in the district court, as follows: (1) a motion for a determination that the types of recoverable damages are governed exclusively by the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761, which precludes all nonpecuniary damages *including pre-death pain and suffering damages*, (2) a motion for partial summary judgment dismissing the decedent's pre-death pain and suffering claim and (3) a motion to preclude the expert testimony offered in support of the pre-death pain and suffering claim. By Memorandum Opinion and Order, entered April 8, 1993, the district court denied these three *separate* motions of KAL. With respect to the applicable law motion, the district court stated:

> The Warsaw Convention allows for the recovery of all "damages sustained" and does not limit who may bring the suit as long as they can prove the loss. The Court of Appeals for the District of Columbia has held that "damages sustained" refers to actual harm experienced. To the extent that this is contrary to the provision of DOHSA, the Warsaw Convention shall prevail.

In re Korean Air Lines Disaster of Sept. 1, 1983, Nos. 83-3587 *et al.*, memo. op. at 2 (D.D.C. Apr. 8, 1993) ("*In re KAL-DDC I*") (citation omitted) (A 53a).

Contrary to Respondent's statement that "the District Court made no statement as to the basis for the remedy" (Opp. at 2), the statement quoted above clearly encompasses the basis for

the recovery of nonpecuniary pre-death pain and suffering damages. The district court reaffirmed this ruling in denying KAL's post-trial motion for judgment as a matter of law. *Forman v. Korean Air Lines*, No. 83-3578, memo. op. at 5-6 (D.D.C. June 6, 1995) ("*Forman I*") (A 15a-16a).

It is absolutely clear that the sole legal basis for the district court's award of nonpecuniary pre-death pain and suffering damages was Article 17 of the Warsaw Convention.

II. Under the Convention "Compensable Harm Is to be Determined by Domestic Law"[2]

Respondent argues that the court below was not required to apply *Zicherman* to the damage award for pre-death pain and suffering "[b]ecause *Zicherman* did not address survival action damages." Opp. at 5-7. This argument misunderstands the effect of the Court's decision in *Zicherman* and overlooks the sole legal basis for the district court's award of nonpecuniary pre-death pain and suffering damages—Article 17 of the Warsaw Convention. *See Zicherman*, 116 S. Ct. at 632-635.

The Court in *Zicherman* unequivocally rejected the argument that any and all types of damages are recoverable directly under Article 17 of the Warsaw Convention. 116 S. Ct. at 632-635. The Court found that the Convention provides "nothing more than a pass-through, authorizing [courts] to apply the law that would govern in the absence of the Warsaw Convention." *Id.* at 636. Thus, the Court concluded:

> Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules.

116 S. Ct. at 637.

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[2] *Zicherman*, 116 S. Ct. at 635.

The Court's holding is not limited to wrongful death and loss of society damages, as argued by Respondent (Opp. at 4), but applies to the determination of *all* "damages" recoverable in an action governed by the Warsaw Convention. Following the Court's holding in *Zicherman*, the question that confronted the court below[3] was whether nonpecuniary pre-death pain and suffering damages are recoverable under "the law that would apply in the absence of the Warsaw Convention." 116 S. Ct. at 636. Even Respondent accepts that this was the analysis mandated by *Zicherman*, when he states that "this Court's direction that a pass-through occur would point directly to the survival action remedy under general maritime law for pre-death pain and suffering." Opp. at 7; *see also* Opp. at 5-6. Thus, Respondent concedes that pursuant to the "direction" of *Zicherman*, damages must be based on some domestic law. In light of this concession, Respondent's argument that the court below "was not obligated to use [*Zicherman*] as precedent" (Opp. at 7) is incomprehensible.

The substance and effect of the applicable domestic law is the precise issue that the court below declined to address, even though both parties, pursuant to the direction of the court below, fully briefed the issue in their respective reply briefs. Respondent ignores that by declining to address KAL's argument, the court below improperly failed to "pass-through" to domestic law, whether the domestic law is general maritime law, as argued by Respondent, or DOHSA, as argued by KAL. The decision of the court below in effect affirmed the award of nonpecuniary pre-death pain and suffering damages solely on the basis of the Warsaw Convention, which is

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[3] As well as the Court of Appeals in *Saavedra v. Korean Air Lines*, 93 F.3d 547, 551 (9th Cir. 1996), *petition for cert. filed*, No. 96-623 (Oct. 18, 1996), and *Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir.), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996), and the district court below in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 12 (D.D.C. 1996) ("*In re KAL-DDC II*"), *interlocutory appeal granted*, No. 96-8013 (D.C. Cir. Aug. 15, 1996).

contrary to the express "direction" (Opp. at 7) of the Court in *Zicherman*, 116 S. Ct. at 635.

Respondent's final argument that *Saavedra v. Korean Air Lines*, 93 F.3d 547 (9th Cir. 1996), *petition for cert. filed*, No. 96-623 (Oct. 18, 1996), does not conflict with the decision of the court below (Opp. at 7-8), is belied by the facts: (1) both *Saavedra* and this case arose out of the KAL flight KE007 disaster; (2) both *Saavedra* and this case were pending on appeal when *Zicherman* was decided; (3) both the court in *Saavedra* and the court below granted KAL's request to address the recoverability of pre-death pain and suffering damages in light of *Zicherman*; (4) both the plaintiffs in *Saavedra* and in the court below asserted that KAL waived the argument; (5) *BUT*, while the court in *Saavedra* addressed the effect of *Zicherman* and vacated the awards of pre-death pain and suffering damages, the court below declined to address the argument and upheld the award.

In view of the express holding of *Zicherman*, which extinguished the sole legal basis for the award for pre-death pain and suffering damages in this case, the court below not only had the authority to address whether nonpecuniary pre-death pain and suffering are recoverable under the domestic law, but legally was required to do so. *See Rivers v. Roadway Express*, 114 S. Ct. 1510, 1519 (1994); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 96 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540-545 (1991).

III. The Court Has the Authority to and Should Address Both of the Questions Presented for Review

Respondent argues that while the second question presented for review by KAL is important and worthy of review, the Court should decline to review the question in this case because the court below "refused to address the substantive issue" of whether nonpecuniary pre-death pain and suffering

damages are available following *Zicherman*. Opp. at 8.[4] Respondent is wrong.

The court below did in fact "pass upon" the issue of the legal recoverability of pre-death pain and suffering damages. *See Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, 965-66 (1995). In refusing to decide whether nonpecuniary pre-death pain and suffering damages are recoverable after *Zicherman*, the court below upheld the district court's award of such damages based solely on Article 17 of the Warsaw Convention. *See supra* at 2-5. Similarly, by considering the sufficiency of the evidence to support the award of pre-death pain and suffering damages, the court below necessarily passed upon the antecedent question of whether nonpecuniary pre-death pain and suffering damages are recoverable as a matter of law. *See Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). Thus, the "substantive issue" was passed upon by the court below.

In light of the intervening decision of the Court in *Zicherman*, the abandonment by the district court below of its prior decision allowing pre-death pain and suffering damages[5], and the fact that the plaintiff in *Saavedra* filed a petition for a writ of certiorari requesting the Court to review this *exact* question, the Court should address the antecedent legal argument at this time by granting the Petition herein. *See Lebron*, 115 S. Ct. at 965-66; *U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 445-47 (1993); *United States v. Williams*, 504 U.S. 36, 40-46 (1992); *Arcadia*, 498 U.S. at 77. Review at this time is prudent because it will avoid the possibility of further conflicts among the lower courts in this litigation and will not prejudice Respondent in any respect. Indeed, remanding the case for further proceed-

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[4] Respondent argues that the Court should grant plaintiffs' petition in *Saavedra v. Korean Air Lines*, 93 F.3d 547 (9th Cir. 1996), *petition for cert. filed*, No. 96-623 (Oct. 18, 1996). *See* Opp. at 7-8.

[5] *In re KAL-DDC II*, 935 F. Supp. at 15.

ings will serve only to delay further the ultimate termination of this litigation.

CONCLUSION

The Petition for a Writ of Certiorari should be granted in all respects.

Dated: October 29, 1996

Respectfully submitted,

GEORGE N. TOMPKINS, JR.
ANDREW J. HARAKAS*
TOMPKINS, HARAKAS, ELSASSER
& TOMPKINS
Courthouse Square
140 Grand Street
White Plains, New York 10601
(914) 428-2525

Attorneys for Petitioner
KOREAN AIR LINES CO., LTD.

* *Counsel of Record*

Of Counsel:

JEANINE C. VERACOECHEA